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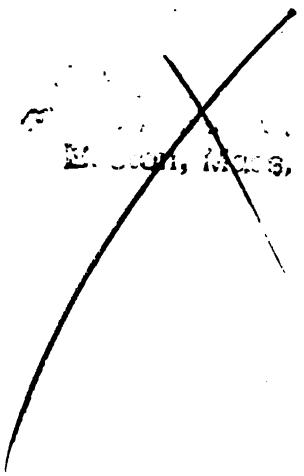

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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

BY THERON METCALF.

VOLUME XIII.

BOSTON:
LITTLE, BROWN AND COMPANY.
1866.

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JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

Hon. LEMUEL SHAW, Chief Justice.
Hon. SAMUEL S. WILDE,
Hon. CHARLES A. DEWEY,
Hon. SAMUEL HUBBARD,
} Justices.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF HAMPSHIRE, FRANKLIN AND HAMPDEN, SEPTEMBER TERM 1847, AT NORTHAMPTON.

[CONTINUED FROM VOL. XII.]

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. SAMUEL S. WILDE, }
HON. CHARLES A. DEWEY, } JUSTICES.
HON. SAMUEL HUBBARD, }

HORATIO L. WARNER & others *vs.* HENRY D. BULL & another.

If, on the trial of a writ of entry against A. and B., there is any evidence against B, however slight, the court may properly refuse to direct the jury, before finding a verdict as to A., to return a verdict for B., for the purpose of his being a witness for A.

If a disseisee, who has a right of entry, peaceably enters upon the land, and there delivers a deed thereof, the deed will pass his title, though the grantee knows that the title is in controversy.

THIS was a writ of entry, to which both tenants, Henry D. Bull and Joseph Bull, pleaded the general issue, and Joseph Bull filed a special notice of a disclaimer. Trial before *Dewey*, J. who made a report thereof, as follows:

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The demandants claimed title to the demanded premises, under the following deeds: One from William Ashley to Israel Ashley, dated September 20th 1783; one from E. Bates and others to Thomas Ashley, dated December 5th 1818; and another from Thomas Ashley to the demandants, dated July 30th 1845. They also introduced evidence tending to show, that they and those under whom they claimed had used the demanded premises as a wood lot, by frequently cutting wood and timber thereon, since the date of the deed first above mentioned.

The tenant Henry D. Bull relied on a title by deed, and upon an alleged adverse possession by those under whom he claimed.

It appeared in evidence, that, in the year 1843, the above-named Thomas Ashley brought an action against certain persons, for alleged acts of trespass on the premises demanded in the present suit; that they pleaded the general issue, and filed a specification of defence, in which they gave notice that they would show soil and freehold in William D. Bull. On the trial of that action, in October 1844, Joseph Bull, one of the tenants in the present action, testified as a witness for the defendants, and a verdict of not guilty was returned.

There was no evidence to show, that, since the date of Thomas Ashley's deed to the demandants, (July 30th 1845,) the tenant Joseph Bull had, by language, or by any act, claimed title to said premises, or that he had been on the soil, or had directed others to go upon it; unless the following constitute such evidence:

It appeared that at various times, prior to July 30th 1845, said Joseph Bull maintained a fence around the premises, in connexion with a cultivated farm adjoining them, (the premises being woodland,) and that he still continued in possession of said farm. It also appeared that William A. Bull, deceased, who was the son of said Joseph Bull, claimed title to said premises, under a mortgage from William Ashley, his grandfather, which mortgage was assigned to said William A. Bull, but has never been foreclosed; and that, on the death of

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William Ashley, said Joseph Bull, who was then the husband of the only daughter and heir at law of said Ashley, claimed to have entered upon the premises, in connexion with his farm, and to have commenced his possession thereof. It did not appear that he had, since July 30th 1845, done any act indicating an intention to abandon the premises, or disconnect them from said farm. It appeared, further, that said William A. Bull died in 1843 or 1844, and that his executor, in 1844, by deed duly executed and recorded, released the whole farm, including the demanded premises, to the tenant Henry D. Bull, who is also a son of said Joseph Bull.

After the evidence for the demandants was put in, the counsel for the tenants stated that said Joseph Bull was an important witness for the tenant Henry D. Bull, and moved that the issue on the disclaimer of said Joseph be presented to the jury before the case should proceed against the said Henry D. Bull. But the judge, considering it a matter resting in the discretion of the court, declined to grant the motion. The motion was again made, after all the evidence on both sides was put in, and was again refused.

The aforesaid deed from Thomas Ashley to the demandants was delivered on the premises, and there was evidence tending to show that said Thomas had, before the date of the deed, been dispossessed of a portion of the premises, and that the demandants knew, at the time of their purchase, that the title was in controversy. And the tenants contended, that, if these facts were proved, the jury should be instructed that the deed was void by reason of maintenance. But the judge refused so to instruct the jury, and a verdict was returned for the demandants. The tenant Henry D. Bull alleged exceptions.

Boise & Davis, for the tenants.

R. A. Chapman, for the demandants.

Dewey, J. 1. The request to the presiding judge to present to the jury the case of Joseph Bull, one of the tenants, before they should be charged with the case of Henry D Bull, with a view of using the testimony of Joseph Bull, after a

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verdict in his favor, upon the further trial of Henry D. Bull, was, in the opinion of the whole court, properly refused. The right of one of several defendants to a separate presentation to the jury, of the issue as to him, is, from the very nature of the case, attended with much embarrassment and delay in the conducting of the case, and renders necessary, virtually, two trials in the same case. The original reason of the rule, sanctioning this course of proceeding, doubtless was, to prevent a fraudulent or improper joinder of persons as defendants, with a view to their exclusion as witnesses for the other party. It is therefore a salutary power to be vested in the presiding judge, and one which, from the very nature of the case, must, to some considerable extent, be a discretionary power, or at least the exercise of it must depend upon his view of the state of the evidence.

If there be any evidence against such defendant, there is no legal right to insist upon a separate trial as to him, with a view of using him as a witness for the other defendant, although the judge may strongly incline to the opinion that the weight of evidence is in his favor. In the present case, there was evidence bearing upon the tenant Joseph Bull, and clearly establishing his connexion with the subject of this controversy; an actual occupation and possession of the premises, at an earlier period than that of the plaintiffs' deed, and under circumstances which might justify uniting him as a defendant, and quite sufficient to justify the presiding judge in refusing the application for a verdict to be taken in his case, prior to passing upon the case of Henry D. Bull. 1 Greenl. on Ev. § 358. [See 2 Car. & Kirw. 429, 710.]

2. The remaining question is as to the effect of the deed of Thomas Ashley to the demandants, under the circumstances stated in the report. A conveyance by a party out of possession, the premises being in the adverse possession of another person, is inoperative to pass the title. But the difficulty in the case supposed is obviated where the grantor has a right of entry, and, having this right, actually enters upon the land, and there delivers the deed to the grantee. As the

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entry restores the possession to the grantor for the time being, the technical difficulty of a want of capacity to convey, in one who is disseized, no longer exists. This principle has been applied by this court in two cases, (*Knox* v. *Jenks*, 7 Mass. 488, and *Oakes* v. *Marcy*, 10 Pick. 195,) under circumstances that would warrant the application of the same principle here. Nor can the objection be sustained, as sufficient to defeat the present action, that the demandants knew, at the time of the purchase, that the title was in controversy. The mere fact, that some third person questions the title of the grantor, cannot prevent the real owner from conveying his real estate to a *bona fide* purchaser, if the grantor can make a peaceable entry upon the land, and there deliver his deed.

The facts in the present case do not bring it within the operation of the principle of champerty or maintenance, so as to defeat the demandants' title on that ground.

Judgment on the verdict for the demandants.

SAMUEL ROOT & another, Administrators *vs.* ALVA STOW & others.

A. and B., in 1827, mortgaged land to C. and D. jointly, to secure one note made by A. and B. to C., and two notes made by them to C., which were signed by D. as their surety: D. paid these two notes, and afterwards, viz. in 1834, C. and D. brought an action on the mortgage, and recovered judgment for possession of the mortgaged lands, unless A. and B. should pay the amount on the other note: Execution issued on said judgment, but was never put into the hands of an officer, and C. never took possession of said lands: In 1840, D. recovered judgment, and took out execution thereon, against A. and B., for the amount of the two notes which he paid for them, as their surety; caused their right to redeem said lands to be sold on said execution; became the purchaser thereof, entered into possession of said lands, and had exclusive possession thereof more than three years: The note which was not signed by D., as surety, was never paid to C., and his administrators brought a bill in equity against D. for relief. *Held*, that C. and D. were tenants in common of the legal estate in said lands; that the court had jurisdiction in equity; that an account should be taken of the sum due on the unpaid note; that upon payment of such sum by D. to C.'s administrators, D. would be entitled to hold the mortgaged lands; and that if D. should not pay such sum to them, they would be entitled to a decree for the possession of said lands.

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Root & another, Administrators v. Stow & others.

The plaintiffs set forth, in a bill in equity, that they were administrators of the estate of Joel Root, late of Granville, to whom Rowland Bancroft and Joseph W. Bancroft, on the 24th of November 1827, made a deed of mortgage of two parcels of land, [described,] the condition of which deed was, that if said Rowland and Joseph W. should pay to said Joel their note of hand, of the same date, for $136, payable in one year from its date, with interest annually, and should also pay to said Joel their two notes of hand of the same date, signed by Alva Stow as their surety, for $136 each, one payable in two and the other in three years from their date, with interest annually, then said deed should be void; otherwise, to remain in force: That on the 7th of May 1832, the first of the aforesaid notes being unpaid, said Joel and Alva sued out a writ of entry against said Rowland and Joseph, to recover possession of said mortgaged lands; and at the April term, in 1834, of the supreme judicial court, held at Springfield, recovered the proper conditional judgment against the said Rowland and Joseph, and took out a writ of execution, which was never delivered to an officer for service; nor did said Joel ever take possession of said lands: That afterwards, on the 20th of July 1840, said Alva became the purchaser, under a sheriff's sale, of the right in equity of redeeming said lands, and then entered upon them, and has ever since had exclusive possession thereof: That said sale was made on an execution sued out by said Alva, on a judgment recovered by him against said Rowland and Joseph, for the sums paid by him, as their surety, on said two notes: That the plaintiffs, in the month of August 1843, demanded of said Alva possession of said lands, which he refused to give: and that said first mentioned note is still unpaid.

The bill then averred, that by virtue of said mortgage deed, by the terms of which the said Joel and Alva, their heirs and assigns, were grantees in common, and by virtue of the aforesaid judgment, the said Alva, though a tenant in common with said Joel, and though he had paid the two notes, on which he was surety for said Bancrofts, yet held his

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moiety of the legal estate in said mortgaged lands, in trust for said Joel and his legal representatives, to secure payment of the note first mentioned in said mortgage deed, and ought to account with the plaintiffs for the rents and profits thereof; and that, by the purchase of said right in equity, and entering into possession of said lands, the said Alva acquired the right to redeem said mortgage, by payment of said last mentioned note.

The plaintiffs further alleged, in their bill, that they were entitled to a decree of foreclosure against said Alva, either as to a part or the whole of said mortgaged lands, unless he should pay said last mentioned note and interest; or to a decree that said Alva hold said lands in trust for the plaintiffs, and account to them for the rents and profits thereof, &c.

The prayer of the bill was, that a subpœna might issue against said Rowland Bancroft, Joseph W. Bancroft, and Alva Stow, that they might be held to answer the bill, and that the court would make such decrees as should secure to the plaintiffs their legal and equitable rights.

The *answer* of Alva Stow admitted the execution of the mortgage and of the notes, as alleged in the bill, but denied that the mortgage was executed and delivered by said Rowland and Joseph W. to said Joel alone, and averred that it was executed and delivered to said Stow and to said Joel, who were joint grantees in said deed, and for the security and benefit of both of them.

It was also averred in said Stow's answer, that the two last mentioned notes, which said Stow signed as surety, were long ago paid by him to said Joel, who therefore had no claim, under said mortgage, for securing those notes; that if the plaintiffs had any claim for satisfaction of the first mentioned note, such claim was only for part of said note, a part thereof having been paid to said Joel; that said Joel caused a suit to be commenced against said Rowland and Joseph W., before a justice of the peace, and on the 28th of February 1832, recovered judgment for the full amount of interest then due on said note, and that said judgment was satisfied.

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The said Stow's answer also admitted the recovery of the conditional judgment, and the issuing of the execution, as alleged in the bill, but denied that the suit in which said judgment was recovered was commenced or prosecuted by his direction, advice or approbation, or for his benefit; and he averred that he had good reason to believe that said judgment was satisfied, or that, if it was not satisfied, it was the fault of the said Joel, in withholding said execution from service, by means whereof he lost his remedy on said judgment.

The said Stow furthermore admitted, in his answer, that he purchased, at a sheriff's sale, the right in equity of redeeming said mortgaged lands, as alleged in the bill, and took possession of the parcel last described in said mortgage deed, and that he had long before, viz. on the 6th of January 1834, taken possession of the other parcel described in said deed, as mortgagee, and for the purpose of foreclosure under a prior mortgage, executed to him on the 2d of January 1826, by said Joseph W. Bancroft, who was then sole owner of said parcel; and that he (said Stow) had continued in peaceable possession thereof ever since; and that when he purchased said equity, as aforesaid, neither the said Rowland and Joseph W., nor the said Joel, had any right or interest in said parcel of land.

The answer denied that the plaintiffs demanded of him possession of the said mortgaged lands in August 1843, or at any other time.

No answer was filed, nor any appearance entered, by Rowland and Joseph W. Bancroft, nor by either of them.

R. A. Chapman, for the plaintiffs.

Boise, for Alva Stow.

Shaw, C. J. This is a bill in equity, brought by the complainants, as administrators of the estate of Joel Root, against Alva Stow, for an account, and for the adjustment of their respective rights in the mortgaged lands described in the bill. Rowland Bancroft and Joseph W. Bancroft, the original mortgagors, are joined as defendants, on the ground that they might still, perhaps, claim a right to redeem, though, *prima facie*, such right was foreclosed by judgment and the lapse

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of time; but they have entered no appearance, and therefore, it is presumed, make no claim.

This is a somewhat involved and complicated case, the leading facts of which are stated in the case of *Root* v. *Bancroft*, 10 Met. 44, where it was intimated by the court that the plaintiffs' remedy was by bill in equity.

The mortgagors, Rowland and Joseph W. Bancroft, being out of the question, the lands mortgaged are to be held by the representatives of Joel Root, the original mortgagee, and the defendant Alva Stow, also an original mortgagee, and surety on two of the notes, according to their respective equitable rights.

We are of opinion that the court has jurisdiction in equity, both upon the ground that the original mortgagees were trustees for each other, and were tenants in common, and that, in regard to real estate held in mortgage, the administrator is the representative of the intestate. The original mortgage was made to Joel Root and Alva Stow, who took a defeasible estate in fee, as tenants in common; but the condition was, to secure a debt to Root only. That debt, however, in fact, consisted of three notes, on two of which Stow was surety to Root. On the face of the mortgage deed, Stow took a moiety of the real estate, as tenant in common; but having no beneficial interest in the condition, he was, *prima facie*, trustee of such moiety, in the first instance, for Root. Then, if Stow, by this deed, acquired any right, legal or equitable, to the mortgaged property, as security for the repayment to him of any sums which he, as surety on the two notes, might be held to pay — as we think he did — his condition, in relation to Root, could not be better than that of a second mortgagee. His claim must be subordinate to that of Root, and after Root had been paid in full. The condition was, to secure to Root the payment of all the notes. It was only after the mortgagors had failed to pay Root, and after Stow, as surety, had been obliged to pay Root, that Stow had any claim for security, or any equitable or beneficial interest. If the name of Stow had not been introduced into the first deed,

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but the Bancrofts had made a second mortgage to Stow, conditioned to indemnify him against his suretyship to Root, the relation of Root and Stow would have been nearly similar; the claims of the latter being subordinate to those of the former.

But the fact, that these parties took the original mortgage to themselves and their respective heirs, makes them tenants in common of the realty; and this is another ground of equity jurisdiction. But further; being such tenants in common, no entry of the one, under a purchase of the equity of redemption, or under color of a judgment, or otherwise, would be deemed an ouster of the other; but, as between themselves, the entry enures to the benefit of both.

Understanding, by the facts, as we do, that the first note described in the mortgage has not been in fact paid, but that the two subsequent notes have been paid by the respondent Stow, as surety, for which he recovered judgment against the Bancrofts, and took their equity of redemption in satisfaction, the opinion of the court is, that an account of the amount due to the complainants, as administrators, on the first note, must be taken, upon payment of which amount the respondent Stow is entitled to hold the land; but that, unless the sum, thus found due, be paid within some short time to be limited by the decree of the court, the complainants will be entitled to a decree for the possession of the land.

Commonwealth *vs.* Reuben Belding.

The proper laying out of a town way, in distinction from a public highway, may be presumed, by a jury, from long user and occasional repairs, with other circumstances tending to show that the way was originally laid out as such way.

On the trial of an indictment for a nuisance in a road, caused by digging a ditch across it, the defendant introduced evidence that, at a remote period, a similar ditch, useful for draining certain meadow lands, was in the same place, and had been afterwards filled up; and he contended, that the nuisance, with which he was charged, was the mere removal of a preëxisting nuisance. *Held*, that if the road had been used more than forty years, without the incumbrance of the ditch, the right to reopen it had been lost.

When a party, who is indicted for obstructing a road, gives evidence that when he

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obstructed it, he opened a new and convenient way on his own land, which was used for seven or eight years, and until a bridge, which he built in the new way, was carried off by a flood, such evidence does not show an abandonment of the old road, nor furnish any defence to the indictment.

This was an indictment, in which it was alleged, in the first count, that on the 1st of April 1844 there was, and from thence to the day of the finding of said indictment "hath been, and still is, a common and public highway in the town of Hatfield, in the county of Hampshire, leading from the north end of Hatfield Street, in Hatfield aforesaid, through the North Meadows in said Hatfield, to a part of said meadow, called Bashan, for all the citizens of the Commonwealth to go, return, pass and repass, in and along the same, at their free will and pleasure;" and that the defendant, on the 1st of April 1845, "did unlawfully and injuriously dig and cut, and cause to be dug and cut, a deep ditch across and upon certain part of the highway aforesaid described, and the said ditch, dug and cut so as aforesaid, in and upon the said part of the highway aforesaid, he the said Belding, from the said 1st day of April until the day of the finding of this bill, unlawfully and injuriously did continue, keep up and maintain; whereby the said highway hath been, for and during all the time aforesaid, and still is, greatly obstructed, stopped up and rendered impassable," &c.

In the second count, the way was alleged to be a town way; and in the third count it was alleged to be a private way; and in both, the obstruction was averred to have been caused by the defendant, by the same means which were set forth in the first count.

At the trial in the court of common pleas, before *Wells*, C. J. the evidence for the Commonwealth tended to show that for fifty years last past, and as far as the memory of the witnesses extended, there had been a travelled way from Hatfield Street into the North Meadows in Hatfield, which are known as the common and enclosed field; and that, within about ten years last past, the gates on the county road, at each extremity where it passes through said meadows, had

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been removed; that the county road through these meadows was first laid out about twenty years since; that the meadows were laid out in different divisions, called Old Farms, Bashan, &c.; that there had been, for and during the terms aforesaid, farm paths or ways to these several divisions; and that these meadows were sometimes comprised in the limits assigned to surveyors of highways, were passed over by the surveyors, and were slightly repaired by them, in a few spots.

It further appeared that Bashan (so called) was a division containing about forty acres, belonging to different proprietors, situated in the northeastern part of said meadows, a mile, or more, easterly of the present county road; that there was a division, called Old Farms, farther north, where there formerly had been three or four dwelling-houses; and that there was a separate way from said Hatfield Street to said Old Farms, called the Farm Path, and from said Farm Path to Bashan; that, by a semicircular course, a traveller could pass from Hatfield Street, through Bashan and Old Farms, to Whately, and thence northerly; and that, at some stages of high water, the way through Bashan had been thus used, both before and since the laying out of the county road.

No record was offered of the laying out of any way in said meadows; the Commonwealth relying on prescription, and the use above stated, and the occasional repairs.

The defendant contended that the evidence did not support the first count, which alleged that the way was a public highway; but the judge overruled the objection.

The defendant also contended that he could not be found guilty, on the second count, of a nuisance to a town way. And on this point the judge directed the jury to inquire, first, whether the evidence proved a public or a private way, and instructed them that the presumption, in the absence of any proof of the laying out of the road, was, that it was a public highway or county road; but that this presumption might be overcome by evidence satisfying the jury that it was originally laid out as a town road; and that if, from the nature of the travel on the road, from its use,

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and from its circular course, they were satisfied that it was a road originally laid out as a town road for the use of the inhabitants only, they might find the defendant guilty on the second count.

As the alleged nuisance was the digging of a drain or ditch across the way in question, for the purpose of reclaiming a large quantity of land in said meadows, the defendant introduced evidence tending to show, as he alleged, that at some remote period a drain or watercourse had existed at the same place, and that the nuisance complained of was a mere removal of a preëxisting nuisance; and he requested the judge to instruct the jury, that if they believed such to have been the state of facts, then the defendant had a right to remove the obstruction. But the judge instructed the jury, that if such had been the condition of things, yet if, for forty years prior to the alleged nuisance, the drain had been filled up, and the occupants of Bashan, and those having a right to use the same, had used the way as a road for that length of time, then the right to reopen the drain had been lost, unless asserted by the defendant within said forty years.

The defendant also contended that the jury might infer an abandonment of the alleged way; it appearing that it had not been used or passable for about ten years next before the time of the act complained of, and it also appearing that the defendant had opened another way across his own land, for the convenience of himself and the proprietors of Bashan, which was used for seven or eight years, and until a bridge in said way (also constructed by the defendant) was carried away by a flood, in 1843. But the judge instructed the jury, that if the defendant did the acts alleged in the indictment, and then provided another road, equally convenient for those who had occasion to use the old way, yet if he suffered the new road to go to decay, then the jury, in the absence of other evidence, would not be authorized to infer that no nuisance had been created by the defendant.

The jury found the defendant guilty, and he alleged exceptions to the foregoing rulings and instructions.

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This case was argued at the last September term.

Huntington, for the defendant. The evidence was not sufficient to prove a nuisance in a town way. Record proof is necessary, and user is not proof of a record. *Commonwealth* v. *Low*, 3 Pick. 413. *Commonwealth* v. *Newbury*, 2 Pick. 57. The way was a private way. See Anc. Chart. 563. An assignment of a way to a surveyor, by selectmen, does not prove that it is a town way. 2 Pick. *ubi sup.* Besides; there was no evidence that any town repairs were ever made on the way in question; that is, on the road to Bashan.

A nuisance is not legalized by forty years' continuance. Roscoe Crim. Ev. (2d ed.) 741. The instructions on this point were therefore wrong.

The instructions as to the opening of another way by the defendant were given upon the unwarranted assumption that he was to do new duties in consequence of having opened it; that is, that he was also bound to keep that new way in repair. Com. Dig. Chimin, D. 2.

Porter, (District Attorney,) for the Commonwealth, cited 1 Hawk. *c.* 76, § 1. Roscoe Crim. Ev. (2d ed.) 511. 1 Campb. 262, *note.* *Stedman* v. *Southbridge*, 17 Pick. 162. *Hicks* v. *Fish*, 4 Mason, 310. *Sumner* v. *Child*, 2 Connect. 610. *Williams* v. *Cummington*, 18 Pick. 312.

Dewey, J. 1. The first question here presented is not whether a town way may be established by dedication; and the case requires no opinion upon that point. But we are necessarily to decide upon another point of some practical importance, and upon which it is supposed by the counsel for the defendant, that this court has heretofore expressed an opinion. That point is, whether the proper laying out of a town road may be presumed from a long user and occasional repairs, with other circumstances, tending to show that the road was originally laid out as a town way, in distinction from a public highway or county road. The charge of the presiding judge was very full to the point, that in the absence of any proof as to the actual laying out of the road, it was to be deemed

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a public highway; but he instructed the jury that they were authorized to find the way in question to be a town way, if the evidence was strong enough to overcome this presumption, and satisfy them that it was originally laid out as a town way.

The cases relied upon by the counsel for the defendant, as bearing upon this question, are those of *Commonwealth* v. *Newbury*, 2 Pick. 57, and *Commonwealth* v. *Low*, 3 Pick. 413. The first of these cases is not in conflict with this ruling; it being held only that a long user of a way by the inhabitants of the town where it is situate, and also by the inhabitants of the adjacent towns, is not sufficient to establish it as a town way, and that such evidence would tend to show it to be a public highway. But the case of *Commonwealth* v. *Low* is supposed to bear more strongly upon the point now raised. It is stated in the opinion pronounced in hat case, that the court "do not perceive how the record of he establishment of such town way as is contemplated by the statute can be presumed from a user of any length of time. If it be used exclusively by the inhabitants of the town, the presumption will be of a grant of a way to the town, which will be strictly a private way, and will not support this indictment. If it be used by the inhabitants of the town in common with other citizens of the commonwealth, it will raise a presumption that the way is a public highway." The doctrine here advanced would seem to be, that user of a way, by the inhabitants of the town in which it is situate, and of the adjacent towns, might raise a presumption of a public highway; but that the like effect of a presumption of a town way, if used exclusively by the town, would not exist. The reason assigned for this distinction seems to be, that in the latter case the way established by the user is a *private* right of way attached to the inhabitants, as such, exclusively, and not, like a town way, open really to the use of all who have occasion to travel thereon. It may be worthy of consideration whether this distinction is sound, and whether there is really any more difficulty, upon the proper evidence, that is

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evidence showing the original location to have been a town way, to presume a town way, than upon other proper evidence to presume a county or public highway. It may require much more evidence, and evidence of a different character; but with the proper evidence it would seem reasonable that a town way might be shown, as well as a public highway, without, in all cases, producing a record of its establishment as a town way. In the case of *Stedman* v. *Inhabitants of Southbridge*, 17 Pick. 162, it was said by the court, that "as a town way may have a lawful origin, it would be difficult to say that no possible combination of circumstances would raise a presumption of a regular laying out." That case, though it did not decide the point, seems to sanction the doctrine that a town way, under some circumstances, may be proved by prescription, or by the presumption arising from user. Upon a full consideration of this question, as now presented, the court are of opinion that the instructions in this case were correct, as to finding the road to be a town way.

2. The next objection taken to the ruling is as to the nuisance proved. The defendant introduced evidence tending to show that, at some remote period, a similar ditch had existed in the road, and was useful for reclaiming certain meadow land, which ditch, at a later period, had been filled up; and he contended that if such were the facts, he had a right to open the drain anew. As to this, the ruling of the court was, that if the road had been used, as such, without the incumbrance, more than forty years, then the right to reopen the drain had been lost. This ruling was correct, and no ground exists for this objection.

3. The further instructions as to the question of abandonment of the old road, and the effect of opening a new way, and the using of the same until a bridge in such new way was carried away, were also proper.

Exceptions overruled.

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Leander Moody *vs.* Ansel Wright.

A sold certain personal property to B., as stock for a tannery, and took a note therefor, payable in four months, with interest annually; and B., to secure the note, made to A. a mortgage, which was duly recorded, of the same and other property, and also of whatever stock, of every description, that might thereafter belong to B., wherever situated, and whether manufactured or not, or whether at market or not, or the proceeds of the same, if sold, and all leather that might thereafter be manufactured from the proceeds of property then on hand, and in whatever shape it might thereafter exist, so that the then existing and the future property and earnings of B.'s tan works might stand conveyed, pledged, and hypothecated to A. *Held*, that A. had no legal or equitable lien on any property which was not in existence at the time of the mortgage, but which afterwards came into B.'s hands, unless he had done some act by which he obtained possession of that property; and that, as he had done no such act, and as A.'s property, acquired subsequently to the mortgage, had been assigned under *St.* 1838, *c.* 163, B. could not, under § 3 of that statute, require that such property should be sold, and the proceeds applied towards the payment of A.'s note to him.

This was a petition, under *St.* 1838, *c.* 163, § 18, for the interposition of the court, as a court of chancery, in behalf of a creditor of two insolvent partners. The petitioner alleged that Horace Wright and Benjamin B. Hoxse, tanners, and partners in business, applied to the judge of probate for the county of Hampshire, in December 1846, for the benefit of the insolvent laws, and that such proceedings were had, upon their application, that all their estate was assigned to the defendant, as assignee: That the petitioner, in July 1839, sold and delivered to said Wright & Hoxse hides, skins and bark, for the sum of $2374.34, on credit, and took their promissory note therefor, payable in four months, with annual interest, and also took a mortgage of said property, and of other property, which mortgage was duly recorded, and by which they secured to the plaintiff whatever hides, skins, bark or stock, which might afterwards belong to them, wherever situated, and whether manufactured or not, and whether at market or not, or the proceeds of the same, if sold, and also all leather thereafter manufactured from the proceeds of the property then on hand, and in whatever shape it might afterwards exist, or whatever form it might assume, so that the then present and future earnings of the said Wright

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& Hoxse's tan works, both stock and proceeds, and whether sold or unsold, might stand conveyed, pledged and hypothecated to the petitioner, for the payment of said purchase money and note: That said note and mortgage had never been satisfied, discharged or cancelled, and that their validity had been repeatedly recognized and confirmed by said Wright & Hoxse, by the payment, and indorsement on the note, of the annual interest thereby secured: That the petitioner, at the first meeting of the creditors of said Wright & Hoxse, presented a petition to said judge of probate, setting forth the facts above mentioned, and also stating that the property intended to be secured by the mortgage aforesaid had been taken by the messenger, under the warrant issued according to the provisions of the insolvent laws, and praying that said property might be sold, and the proceeds thereof applied to the payment of said note, and that he might be admitted as a creditor for the residue, if any; referring to the schedules and return of the messenger for a description of the property to be sold; but that said judge of probate "did order and decree that the prayer of said petition should not be granted:" That a large amount of the property intended to be conveyed and hypothecated, as aforesaid, was taken by said messenger, and afterwards by the defendant, as assignee, in behalf of the general creditors of said Wright & Hoxse: That although, in the course of the business of said Wright & Hoxse, the identical property which was sold and delivered to them, as aforesaid, by the petitioner, was changed into other forms, yet the proceeds thereof were so used and invested as to assume the form of and become the property thus taken by said messenger and the defendant; that said property, thus taken and held by force of said mortgage, was a portion of the property and earnings of Wright & Hoxse's tan works, and was described in said mortgage, and therein pledged and hypothecated to the petitioner; and that said Wright & Hoxse continued their business as tanners until said warrant issued.

The petitioner's *prayer* was, that the property aforesaid

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taken by the defendant, as assignee, or the proceeds thereof. might be applied towards the payment of said note, and that he might be admitted as a creditor, for the residue thereof, if any, according to the provisions of *St.* 1838, *c.* 163, § 3; and that such other order or decree might be made in the premises, as law and justice might require.

The *answer* of the respondent averred, that all the property belonging to the said Wright & Hoxse, at the date of said note and mortgage, was afterwards, from time to time, disposed of by them, at their pleasure, and that at no time between the date of said mortgage and the taking of their property by the defendant, as assignee, did they ever set apart to the petitioner any specific portion of their property, which might have been purchased, if any was so purchased, with the proceeds of the property included in said mortgage; nor did they ever account to the petitioner, specifically, for the proceeds of the same, or any part thereof; nor did they, in the purchase and acquisition of stock, or other property which might have belonged or come to them, after the date of said mortgage, make any distinction between such, if any, as was purchased or acquired with the specific proceeds of the property belonging to them when said mortgage was executed, and that which was the proper fruit of their own personal labor, money and income, or which accrued to them from any other source than the sale of said hypothecated property. Wherefore the respondent prayed that the decree of the judge of probate might be affirmed.

The arguments in this case were submitted in writing.

Huntington, for the petitioner. By the express provision of *St.* 1838, *c.* 163, § 18, this petition is to be heard as a case in chancery, and is therefore to be decided by the application of the principles of equity. Hence the case does not come within the principles laid down in *Jones* v. *Richardson*, 10 Met. 481, which was a decision at common law. Indeed, in that case the court seem to admit that the application of equity law would have led to a different conclusion.

The character and terms of the mortgage are to be carefully

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considered. The debt to the petitioner existed when the mortgage was executed, and was concurrent therewith. It was not a fraudulent preference. It recites the transaction, and shows that the original sale, for which the note and mortgage were given, was in a measure conditional, and that the ownership, whatever form the property might assume, was never wholly and absolutely divested, but was subjected to a lien. The instrument is a mortgage and something more. It is a contract executed and executory. It protects the property, under all changes and forms, on its face. It purports to be a mortgage and an hypothecation.

The mortgage was recorded when made, which in law is equivalent to a delivery and possession by the mortgagee. And as it recites the nature of the transaction, and gives notice to creditors, by the recording, of the hypothecation — of the executory character of the pledge — it must be considered as creating a potential possession of the after acquired property, as against other creditors.

The payment of annual interest on the mortgage note, and indorsed thereon, is in equity a renewal of the mortgage each year, and attaches to the property then on hand, though acquired after its execution.

It is also material to be noted, that the application of the mortgagors for the benefit of the insolvent laws was voluntary. They instituted the proceedings in insolvency.

It is a settled principle, that the property in the hands of the assignee is subject to all the equities to which it would be subject in the hands of the mortgagors themselves. And there can be no doubt that the instrument created an equitable lien on after acquired property, upon general equity principles. The petitioner being the original owner of the property, and having taken a mortgage of it, as security, it is, in the language of Putnam, J. (*Macomber* v. *Parker*, 14 Pick. 505,) "a transaction which the *law* delights to uphold, if it can." *A fortiori* will equity delight to uphold it.

The cases of *Eastman* v. *Foster*, 8 Met. 22 – 27, and *Davis* v. *Newton*, 6 Met. 542 – 545, show how far the court

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has already gone, as a court of chancery, in protecting equitable liens, in construing the insolvent act of 1838.

As to power to mortgage after acquired property, see also Story on Bailm. § 294. *Mitchell* v. *Winslow*, 2 Story R. 630. After the reasoning in this last case, and the authorities there cited, it would be useless to discuss the question at length, in the present case. Since that decision, the main question here is, whether this court, sitting as a court of chancery, will apply the principles of the common law, or the principles of equity, in a case enjoined by the legislature to be heard in equity only.

Delano, for the respondent. The answer of the respondent shows that none of the property which was sold and delivered to Wright & Hoxse, and mortgaged back to the petitioner, can be specifically traced into the respondent's hands. Undoubtedly some portion of the proceeds of that property may have their equivalent in the mass of the property assigned to the respondent; but his answer likewise shows that it is impossible to determine the extent, proportions or value of this equivalent.

In answer to the suggestion of the petitioner's counsel, that the original sale was never absolute, but was in a measure conditional, and that the vendor retained a lien, the reply is, that if it be meant that a lien resulted, independently of the mortgage back, no such doctrine is applicable to personalty; and that, in case of realty, the vendor waives his lien, whenever he takes his security for the purchase money, in a distinct and independent form. 2 Story on Eq. §§ 1222, 1226 *et seq.* But supposing it to be otherwise, and that the petitioner did, upon the original sale, retain a lien; yet, the original property having disappeared, *that* lien cannot avail him, unless it silently extended itself, from time to time, over newly acquired property, without any agreement to that effect; which will hardly be contended. Submitting, therefore, that no lien resulted to the petitioner, unless by force of the mortgage, the question is, whether the mortgage itself confers a lien; and, if so, whether it can prevail against the assignee under the insolvent law.

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1. Our proposition is, that if the after acquired property was in such a plight, on the day of the first publication of notice by the messenger, that it might have been taken in execution and held against the mortgagee, it is, by express provision of *St.* 1838, *c.* 163, § 5, made the assignee's, and cannot, therefore, be the mortgagee's. The words of that section are, that the "assignment *shall vest* in the assignees all the property of the debtor, both real and personal, which he could by any way or means have lawfully sold, assigned or conveyed, or which might have been taken in execution on any judgment against him, at the time of the first publication of issuing the above mentioned warrant, although the same may then be attached on mesne process, as the property of the said debtor." No equitable right is open to the petitioner, against this statutory provision. In all cases, where a rule of property is prescribed by statute, *æquitas sequitur legem.* And it is impossible to see any good reason, legal or equitable, why property which *is* attached, and property which *may be* attached (or taken in execution, which is the same thing) should be placed in two entirely distinct categories.

The position, taken for the petitioner, that it is a prevailing principle, in bankruptcy and insolvency, that the assignee takes only the assignor's rights, subject to the equities of third persons, is sound, in cases where the particular bankrupt or insolvent act has not ordered otherwise. But the legislature may enlarge or restrain the assignee's rights, at its pleasure.

Thus far, we have assumed that the after acquired property in question might have been taken in execution on a judgment against Wright & Hoxse. This must depend on the question of the efficacy of the mortgage at law; and that it could not stand, at law, is settled by the case of *Jones* v. *Richardson*, 10 Met. 481. See also *Lunn* v. *Thornton*, 1 Man. Grang. & Scott, 379. *Gale* v. *Burnell*, 7 Adolph. & Ellis, N. R. 850. The mortgage could vest no future interest in the petitioner, without some new intervening act or conveyance, to give life and vigor to the precedent conveyance, according to Lord

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Bacon's maxim, cited by Wilde, J. in 10 Met. 492. No such act is shown to have been done.

2. An instrument purporting to transfer after acquired property creates no equitable lien. In looking through the opinion of Story, J. in the case cited against us, on this point, (*Mitchell* v. *Winslow*, 2 Story R. 630,) it will be seen how much weight he gives to the *dicta* of Vice Chancellor Wigram, in *Langton* v. *Horton*, 1 Hare, 549. But it distinctly appeared, in this last case, that there had been a delivery to the mortgagee; so that there had been a new and intervening act, which gave life and vigor to the original instrument. And in *Mogg* v. *Baker*, 3 Mees. & Welsb. 195, the court of exchequer made a decision contrary to that of Story, J. in *Mitchell* v. *Winslow*, and to the *dicta* of Wigram, V. C. It has not, therefore, yet become a doctrine of equity jurisprudence, that a mortgage of a mere prospect of property creates an equitable lien.

3. Admitting, for argument's sake, Judge Story's doctrine of lien, yet this court has not the power to enforce such a lien. If, under the ordinary equity jurisdiction of this court, irrespective of § 18 of the insolvent act, the mortgagee could have had no relief, he can have no more ample relief under that section; that is, § 18 opens no new department of equity jurisdiction, but only enables the court to apply its old jurisdiction in a more summary manner. Otherwise, by the very act of going into insolvency, or by driving a debtor into insolvency, a multitude of new remedies might spring up in favor of special claimants, to the utter exhaustion of the assets, and the law be made to operate for the relief of particular creditors; though its acknowledged policy is to benefit the general creditors. Are there, then, any equitable liens, which could not be enforced under the ordinary jurisdiction of this court? Judge Story says there are many, and that this very species of lien, now in question, is among the number. *Fletcher* v. *Morey*, 2 Story R. 566, 567. And this court has held that its ordinary jurisdiction does not extend to equitable mortgages. *Eaton* v. *Green*, 22 Pick.

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526. Would the court, then, under the insolvent law, authorize the vendor of real estate to assert his lien, or the mere depositary of title deeds to come before the judge of probate or master, and pray that his equitable mortgage might be satisfied out of the insolvent debtor's estate?

The cases of *Eastman* v. *Foster*, 8 Met. 19, and *Davis* v. *Newton*, 6 Met. 537, have been cited, to show how far this court will protect equitable rights under the insolvent act. But it is submitted, that the same rights would have been protected by the court, in the exercise of its ordinary jurisdiction in equity. The first of these cases was a clear case of trust, and might have been enforced in favor of the *cestuis que trust*, under the ordinary jurisdiction over trusts. In the other of those cases, the notes were designedly so held that the husband's creditors should never reach them, or the proceeds of them, by attachment or execution, so that they were not properly within § 5 of *St.* 1838, *c.* 163. And the wife's equitable right to a provision will be protected under the ordinary jurisdiction of the court. *Sawyer* v. *Baldwin*, 20 Pick. 387. *Page* v. *Estes*, 19 Pick. 271. This protection is often afforded by injunction.

4. To hold a lien, like that now claimed, to be valid under the insolvent law, would lead to absurd consequences. If the after acquired property had been under attachment at the time of the first publication, and the attachment had been dissolved, it could not be successfully contended that, in equity, the effect of the dissolution would be to let in a lien, to the exclusion of the general creditors. If not, then the absurdity, to which the petitioner's doctrine leads, is this, viz. that the general creditors, in order to secure the property for general distribution, must first cover it with attachments thus multiplying suits, and absorbing the assets.

5. The assignee, in a case like this, where there is no notice by the record, to creditors, must take the property as a *bona fide* purchaser without notice.

Huntington, in reply. 1. The respondent, under the first division of his argument, places the whole strength of

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his case on the terms and verbal force of a single clause of § 5 of the insolvent act, in relation to property liable to be "taken in execution." The case of *Grant* v. *Lyman*, 4 Met. 470, gives a judicial construction to this clause, at variance with that given by the respondent. The court say it was intended merely to cover fraudulent conveyances by the debtor. On reading that clause, in connexion with what follows it, and with § 3, on which this petition is founded, the court will find mortgages, liens and pledges of all kinds protected.

It is conceded that the mortgagors could not have sold or conveyed this property. The mortgage was good, at common law even, between the parties to it. 10 Met. 492. To contend that the mortgagee's property is divested, because it comes within the language respecting property that may be taken on execution, proves too much. It would divest the title of every mortgagee, whether of personal or real estate; for by the revised statues all such property may be seized on execution and sold, subject to a mere demand, in one case,* and set off, in the other. It would divest an insolvent debtor's wife of an inchoate right of dower, which is recognized as a valid lien in bankruptcy. Going from the letter to the spirit of the act, we find that it protects all liens, save that by attachment. By excepting that, it affirms all others.

If an attachment had intervened, in this case, we do not perceive why, if a mortgage *subsequent* to an attachment, as in *Grant* v. *Lyman*, would hold good, while the attachment was displaced, a *prior* lien would not be protected. If the property is "placed in two entirely distinct categories," it is the fault of the legislature, who did this very thing in a case like that of *Grant* v. *Lyman*.

The case of *Jones* v. *Richardson* was that of a mortgage executed, not also executory. The maxim of Lord Bacon, cited in that case, applied only to attaching creditors, not as between the parties. But even as to the parties, Wilde, J. held that an act of the mortgagor, affirming the mortgage,

* But see *Lyon* v. *Coburn*, 12 Met. 310.

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would be sufficient. That was all which was required in *Lunn* v. *Thornton*, and *Gale* v. *Burnell*, cited by the respondent. Any new act is sufficient, according to Lord Bacon. Now, in the case at bar, the payment of interest each year was an annual appropriation and delivery of a portion of the proceeds of the property originally conveyed; a delivery of part in recognition of the liability of the whole; possession given of a part, in its new form, to wit, in money, in renewal and perpetuation of the contract.

2. Under the second head, we suppose the respondent means to say, that an instrument purporting to convey after acquired property, the product of property previously conveyed, creates no equitable lien. And it is said that although Judge Story held the contrary, in *Mitchell* v. *Winslow*, 2 Story R. 630, yet he did not thoroughly examine the authorities, but relied on *dicta* in the case of *Langton* v. *Horton*, 1 Hare, 549, which was, in its important facts, not in point. It is to be remarked, however, that Judge Story placed stress, not on the facts of the case in Hare, but on the reasoning of the vice chancellor on the general question. And the case of *Mogg* v. *Baker*, 3 Mees. & Welsb. 195, which has been relied on, as shaking the decision of Judge Story, decides merely that an agreement to convey, at a future day, after acquired property, does not create an equitable lien, and that an agreement to mortgage, at a future day, specific property, does create such lien. That case, therefore, merely limits a principle, which is often adopted in equity, viz. to consider a thing done which is agreed to be done, and which, in the case at bar, is actually done by the mortgage itself. The argument of the respondent confounds an agreement to execute a mortgage, at a future day, of after acquired property, with an actual mortgage of such property — an agreement to do a thing, with its actual performance.

3. The respondent, to avoid the pressure of the equitable claims of the petitioner, contends that the court has no power to grant his prayer; that they have no new jurisdiction, under *St.* 1838, *c.* 163, but are to exercise the old in a more

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summary manner. This limitation and restriction of power is not found in that statute. Besides; this is an equitable lien recognized by that statute itself. The provision, in § 3, on which this petition is founded, is for the sale of property when "any creditor has *any* mortgage or pledge of any real or personal estate of the debtor, or *any* lien thereon." Still further; this petition does not require the exercise of extraordinary jurisdiction, because the instrument in question is a mortgage, *eo nomine*, and the petition is by a creditor who holds a mortgage good at common law, as between mortgagor and mortgagee. 10 Met. 492 – 494. Had there been no insolvent proceedings and no attachment in this case, and the mortgagee had taken possession, the common law would have protected him. The mortgagors could not have redeemed, without a tender of the sum due.

The insolvent law has enlarged the equity powers of the court since the decision in *Eaton* v. *Green*, and the court has not since hesitated to exercise that power in cases of equitable liens created by mortgage. *Eastman* v. *Foster*, 8 Met. 19. *Davis* v. *Newton*, 6 Met. 537.

4. The absurdity with which the respondent charges the petitioner's doctrine, is nothing but what the insolvent law produces, by providing that a creditor must attach and make costs, in order to compel a debtor to go into insolvency.

5. The question, whether the assignee takes this property as a purchaser without notice, is not raised in the present case. The mortgage was recorded; and as it recites the nature of the lien and its executory prospective character, creditors are bound by the legal effect of its terms. If it creates an equitable lien, the creditors had notice of that lien. 8 Met. 25.

Dewey, J. The positions taken by the opposing counsel have been fully and ably presented, in their respective arguments; but, in the view we have taken of the case, it has become unnecessary to express any opinion upon several of the points raised. We have directed our attention more particularly to one, which is a leading and material one, and decisive of the case.

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The instrument offered in evidence by the petitioner, as the foundation of his claim, purports to convey to him certain articles of personal property, consisting of hides, skins and bark, all then in existence, and in the possession of the grantors, and also whatever hides, skins, bark or stock, of whatever description, that may hereafter belong to the grantors, wherever situated, and whether manufactured or not, and at market or not, or the proceeds, if sold; also, all leather thereafter manufactured from the proceeds of property then on hand, and in whatever shape the property might thereafter exist, or whatever form it might assume; so that the then present and future property and earnings of the tan works might stand conveyed, pledged and hypothecated to the petitioner.

This instrument, so far as it purports to mortgage the property of the mortgagors then in existence, and held by them, was in all respects a valid instrument; and if any such property now remains for it to operate upon, it will be effectual to pass the same to the petitioner. We understand, however that the case shows no such property in the hands of the assignee, and that the specific property conveyed by the petitioner to Wright & Hoxse, and by them reconveyed in mortgage to him, has no longer any existence, and that the only ground of sustaining this petition is that of a lien upon subsequently acquired property, which had no existence at the time of the execution of the mortgage, and which has no other connexion with it, than that, to some extent, it may have been purchased with funds which were the proceeds of various sales from the tannery; first of the articles purchased, and their proceeds applied to the purchase of new stock, which, when manufactured, was again sold, and its proceeds invested; and so from time to time. This instrument is clearly, therefore, an attempt to mortgage or hypothecate after acquired property. Can such security be made effectual by the making and recording of such instrument, without any further act of the parties, with no delivery by the mortgagor, and no act on the part of the mortgagee

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taking possession or exercising any rights of property in the newly acquired articles, by virtue of the provisions in the mortgage, as to such property?

This subject has been recently before us, in the case of *Jones* v. *Richardson*, 10 Met. 481, involving the question as to the validity of such a mortgage in a court of law. The subject was very maturely considered, and the court were all clearly of opinion that such mortgage did not pass after acquired property. It was stated, in that case, as an elementary principle, that "a person cannot grant or mortgage property of which he is not possessed, and to which he has no title." All the qualification introduced was, that one may grant personal property of which he is potentially, though not actually, possessed; as in the case of the grant of all the wool that shall grow on the sheep he owns at the time of the grant, but not wool which shall grow on sheep not his, but which he may afterwards buy.

In our opinion these principles as to conveyances of property are equally sound, and equally to be enforced, whether the question as to the right of property is raised in a court of law, or of equity. The parties appear before us, each claiming the property by conveyance; the petitioner by the instrument already recited, and the defendant as assignee, holding by virtue of a deed from a master in chancery, for the benefit of all the creditors of Wright & Hoxse. Whether it would really be more equitable, in a case like the present, that the after acquired property should be holden by the one party or the other, whether the claims of the individual creditor would, in an equitable view, be more meritorious than those of the entire body of creditors, seeking a distribution *pro rata*, would depend, not so much upon any thing disclosed on the face of the mortgage, as upon a full knowledge of the entire course of business of the mortgagor, and the circumstances appertaining to the property which is now the subject of controversy, the mode of its acquisition, &c.

Supposing ourselves clothed with full equity powers, and treating this case as before us unembarrassed by any question

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as to our limited jurisdiction in chancery, we are not satisfied that the petitioner has shown any such title to this property as would authorize us to hold it to be subject to a lien for the note of Wright & Hoxse to the petitioner, as against creditors who have acquired a right to it before any act of the petitioner had taken place, reducing the property to his possession, or by asserting effectually any right under the prospective hypothecation, as by making a claim and taking possession under it, while in the possession of Wright & Hoxse. There are doubtless equitable liens, which may be enforced in courts of equity, though not available in a court of law. Many such might be enumerated. That which nearest approaches the present case is that of an agreement to convey property, or do some act, the performance of which has been casually postponed; and in dealing with the rights of the parties in such case, a court of equity will consider a thing done which was agreed to be done. That class of cases does not present, however, the difficulties that arise in the present case. The property which is the subject of the agreement, in the case supposed, was in existence, and the power to convey the same, or stipulate for a conveyance, existed. Nor do the cases of *Davis* v. *Newton*, 6 Met. 537, and *Eastman* v. *Foster*, 8 Met. 19, at all conflict with the view we have taken of the present case. The property, in reference to which those cases presented questions, was in existence, was susceptible of being conveyed, and was the subject of bargain and sale. In the case of *Eastman* v. *Foster*, more particularly relied upon, the mortgage was a good and valid mortgage in law, and of property then in existence; and the party only went into equity to enforce a claim arising under such valid mortgage. The case was one of implied trust, of which this court has jurisdiction, and which it may well enforce.

The difficulty that presses in the present case is the want of any binding original contract, which *per se* could have force and effect to change the after acquired property, without some further act by the parties, after the property should have come into existence. Such act we deem to have been

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necessary to perfect the title of the petitioner, whether his rights of property in such after acquired articles are sought to be enforced in equity or at law. We are fully aware that a different view of this question was taken by Mr. Justice Story, in the case of *Mitchell* v. *Winslow*, 2 Story R. 630, and that the result to which he came differs from ours as to the effect to be given to such mortgages in a court of equity. In relation to that case, it is supposed by the counsel for the petitioner, that it had, to some extent, the sanction of this court, in the remarks of the judge who delivered the opinion in the case of *Jones* v. *Richardson*. But we apprehend that no such view was intended to be suggested. The case then before the court was an action at law; and the obvious and quite sufficient answer to the case of *Mitchell* v. *Winslow*, which was relied upon by the then plaintiffs, was, "that was a case in equity," without entering upon the further inquiry whether we should, as a court of equity, in a case before us, come to the same result. The case of *Langton* v. *Horton*, 1 Hare, 549, much relied upon as sanctioning the doctrine that such conveyance might be supported in a court of equity, seems to us to go no further than this, viz. that there having been such a contract between the parties, as would in equity have given the plaintiff a title to the cargo when it arrived, and that contract having been perfected by possession lawfully taken, it being a case of property mortgaged while at sea, and it being sufficient to take possession forthwith on its arrival, the plaintiffs were entitled to hold under this contract, as against a judgment creditor. On the other hand, another adjudication may be referred to as strongly sustaining the view we take of the invalidity of this mortgage, *in equity*. I allude to the case of *Mogg* v. *Baker*, 3 Mees. & Welsb. 195, in the court of exchequer. As I understand that case, the doctrine that a lien may be enforced in equity, in a case like the present, is wholly repudiated. The court held that an agreement to mortgage certain specific furniture then in existence would constitute an equitable title in the party holding such agreement, and prevent its passing to the assignees

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of the insolvent; but if it was only an agreement to mortgage furniture to be subsequently acquired, then it would confer no right in equity. It is true, as was remarked by the counsel for the petitioner, that the court were dealing there with the equity principle of construing that to have been done which was agreed to be done; but no question arose as to the correctness of that principle of equity, and the only point of controversy was, whether, taking that to have been done which was agreed to be done, it would constitute a valid equitable lien. And whether it would do so or not, was made to depend upon the fact whether the property was subsequently acquired; and, if so, it was held that the agreement would confer no right in equity. The doctrine of that case, which seems fully to sanction the principle we have adopted in the present case, was affirmed by the court of Queen's Bench, in *Gale* v. *Burnell*, 7 Adolph. & Ellis, N. R. 850.

The result to which we have come, upon the present petition, may be stated in the following propositions: The petitioner cannot hold the property in controversy, as mortgaged property, because it was not in existence, and therefore not capable of being conveyed in mortgage, at the time when the mortgage was made. The instrument could not operate to pass the property as a pledge, because the custody of the same was not taken and retained by the pledgee. The property cannot be held as charged with a lien, because a lien cannot be created by an executory agreement, without being accompanied by possession or delivery of the property. A stipulation that future acquired property shall be holden as security for some present engagement, is an executory agreement, of such a character, that the creditor with whom it is made may, under it, take the property into his possession, when it comes into existence, and is the subject of transfer by his debtor, and hold it for his security; and whenever he does so take it into his possession, before any attachment has been made of the same, or any alienation thereof, such creditor, under his executory agreement, may hold the same; but, until such an act done by him, he has no title to the same; and that, such act

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being done, and the possession thus acquired, the executory agreement of the debtor authorizing it, it will then become holden by virtue of a valid lien or pledge. The executory agreement of the owner, in such case, is a continuing agreement, so that when the creditor does take possession under it, he acts lawfully under the agreement of one then having the disposing power, and this makes the lien good. If, however, before taking possession, or doing such acts as are necessary to give vitality to the mortgage, as to the subsequently acquired property, an attachment or assignment for the benefit of creditors takes place, the opportunity for completing the lien is lost, and the mortgage or pledge not being perfected, the property passes to the assignee, and must be held by him for the benefit of the creditors generally.

There was no act done by the petitioner and by Wright & Hoxse jointly, or by either of the parties, which was sufficient to give effect to the original mortgage, as to the after acquired property. The recording of the mortgage by the petitioner did not; for that was before such property was acquired. The annual payment of interest by Wright & Hoxse could have no such effect. It was neither actually nor symbolically accepting the transfer or conveyance of the articles after they were acquired by Wright & Hoxse.

As to the point suggested, that this agreement between these parties might be treated as a conditional sale by the petitioner, the change of property to take effect only on payment of the note; it was competent for the petitioner to have made such a conditional sale, and the effect of such sale would have been, that he would not have been divested of the property in the articles thus conditionally sold. But no such principle can avail the petitioner here, as no articles remain in existence that were his property and possessed by him at the time of the sale. The petitioner seeks not to reclaim such articles, but those subsequently acquired by his debtors. Nor is there any ground for the suggestion that this may be treated as the constitution of an agency on the part of Wright & Hoxse, and that, as such agents, all their acquisitions would

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enure to the petitioner as the principal, until the note of Wright & Hoxse was fully paid.

In no way, that we perceive, can we give effect to this contract, so as to give the petitioner the lien, upon the after acquired property, that he seeks to establish.

Petition dismissed with costs.

OSMYN BAKER & another *vs.* AUSTIN SMITH, Executor.

A testator bequeathed to his executor, in trust, a large sum, to be secured at interest, and managed as an accumulating fund, until a board of trustees should be duly constituted and organized, and then that said sum should be paid over to such trustees, to be managed in the same manner; and he directed that said board of trustees should be constituted as follows; viz. that each of eight certain towns should annually, in March or April, at a legal town meeting, choose an elector, and that the several electors, thus chosen, should annually meet at N. on the first Wednesday of May, and elect three trustees, who should be a board of trustees for one year; provided, however, that the first choice of said electors, by the towns, and also their first meeting at N., might be made and holden at such convenient time, within one year after the testator's decease, as the judge of probate should appoint, and that said trustees, thus elected at said first meeting, should hold their office till the first Wednesday of May next following, and until others should be chosen in their place: The testator died in December 1845, and his will was not finally approved and allowed until July 1847: On the 10th of August 1847, the judge of probate appointed the 30th of said August as the time for the eight towns to choose electors, and the 6th of September following as the time for the meeting of the electors at N, and electors were chosen and met at N. accordingly, and elected three persons to be trustees, who organized as a board of trustees, and demanded of the executor that he should pay over to them the sum aforesaid, according to the will; and on his refusal so to do, they brought a bill in equity against him. *Held*, that they were not legally constituted a board of trustees, because the judge of probate had no authority to direct town meetings, or a meeting of the trustees, to be held after the expiration of one year from the decease of the testator.

THIS was a bill in equity, in which it was alleged that Oliver Smith, late of Hatfield, died on the 22d of December 1845, leaving a last will, which was finally approved and allowed in the supreme judicial court, in July 1847; that Austin Smith, the defendant, was appointed executor of said will, and that letters testamentary were duly issued to him, by the judge of probate for the county of Hampshire, on the

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10th of August 1847; that said Austin, as such executor, became possessed of all the property of which said Oliver died seized and possessed, (with certain exceptions,) amounting to about four hundred thousand dollars, which he was bound to deal with and dispose of according to the directions of said will: That said Oliver, by his said will, set apart the sum of two hundred thousand dollars, for certain public and charitable uses, to be administered upon a plan prescribed in said will, and directed that said sum should be kept at interest until it should accumulate to the sum of four hundred thousand dollars, and that then there should be established, out of said gross fund, certain minor funds especially appropriated to certain charitable objects designated in said will: That said Oliver, in the *third* section of his will, made the following (among other) provisions and directions:

"In order to accomplish more effectually the objects contemplated in the appropriation of the several funds hereafter designated, and for the purpose of managing the same with greater facility, security and advantage, I hereby direct that a board of trustees shall be established, to have the custody, control and management of said funds, who shall be accountable for the proper and faithful discharge of the duties appertaining to their office, and who shall manage, improve and apply said funds, and the interest arising therefrom, in the way and manner, and for the purposes and uses hereinafter specified and declared. And it shall be the duty of the said board of trustees, and their legal successors forever, to carry into full effect all the provisions of this will in relation to the receipt, custody, care, management, appropriation, expenditure and payment of the various legacies and funds designated in this will, except such as necessarily appertain, or are expressly assigned, to my executor, or to others. And I hereby order and direct that the said board of trustees shall be appointed and constituted in manner following: The several towns of Northampton, Hadley, Hatfield, Amherst and Williamsburgh, in the county of Hampshire, and Deerfield, Greenfield and Whately, in the county of Franklin, shall

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annually, in the month of March or April, at a legal town meeting, (an article to that effect being inserted in the warrant therefor,) choose one person, being an inhabitant thereof, as agent for said town, to be called an elector. And the several electors thus chosen, such choice being duly certified, shall meet at Northampton on the first Wednesday in May annually, and shall then and there elect, by a majority of the votes given in, three suitable persons to act as trustees of said funds; and the persons thus elected shall constitute the board of trustees, and shall hold their office for one year, and until others are chosen in their stead. Provided, however, that the first choice of said electors by the towns, and also their first meeting at Northampton for the choice of trustees, may be made and holden *at such convenient and suitable time within one year after my decease, as the judge of probate for the county of Hampshire shall appoint;* and the said trustees, thus elected at said first meeting, shall hold their office till the first Wednesday in May then next ensuing, and till others hall be chosen in their place." "And the said trustees, before entering upon the duties of their office, shall respectively give bonds, with sufficient sureties, to the treasurer of the county of Hampshire, and to the acceptance of said board of electors, for the faithful discharge of said duties; which bond shall enure to the benefit of the several funds, to each one its proportionate share." "And in case the said board of trustees shall, at any time, be reduced to a less number than two, I direct that the judge of probate for the county of Hampshire shall be requested, by the remaining trustee, to appoint two suitable persons to be associated with him in the management of said funds, until the vacancies in said board shall be filled by the electors."

The plaintiffs then set forth in the bill the following parts of the *fourth* section of said Oliver's will:

"I give to my nephew, Austin Smith, in trust however, and for the uses and purposes herein specified, the sum of two hundred thousand dollars, to be secured at interest,

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and managed as an accumulating fund, by the said Austin, until the board of trustees, provided for in the preceding section, shall have been duly constituted and organized; at which time the said board of trustees shall be authorized, and it is hereby made their duty, to demand and receive of the said Austin Smith the said sum of two hundred thousand dollars, together with all the interest and income that shall then have accrued on the same. And the said Austin is hereby directed to pay over the same to the said board of trustees, as soon as the said board shall have been duly organized. Provided, however, that such payment may be made by a legal transfer and delivery to said board of any of the different kinds of property, to the amount required, together with the evidences and securities thereof, of which I may die possessed, at its par value if in stocks of any kind, and its appraised value if in real estate. And the said fund shall thenceforth be and remain under the care and control of said board of trustees, to be by them at all times secured and kept at interest, according to their best judgment and discretion, and managed as one entire fund, and the interest thereof annually added to the principal, thus forming an accumulating fund, without allowing any subtraction of either principal or interest therefrom, (except for the purpose of supplying any deficiency which may happen to exist, or of meeting any unforeseen emergency that may arise from the failure of the 'contingent fund' hereinafter provided,) until the said principal and interest shall amount to the full sum of four hundred thousand dollars."

A part of the *fifth* section of said will was then set forth in the bill, as follows: "All the residue of my estate, of every kind, not herein otherwise disposed of, after payment of my just debts, and the expenses of settling my estate at the probate office, I give in trust to the said Austin Smith, and for the purpose of constituting a 'contingent fund,' to be invested and managed by the said Austin, ***until the said board of trustees, before mentioned, shall be organized, and thenceforth to the said trustees***, in the way and manner pointed

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out in the fourth section, for managing the fund there established."

The plaintiffs then averred, in the bill, that after said will was approved and allowed, and after letters testamentary had been issued, as above mentioned, the said judge of probate, "by virtue of the above recited provision in said third section, and pursuing the manifest intent of said testator, on the 10th day of August 1847, did, by an order then made and recorded, ordain and appoint the 30th day of said August as a convenient and suitable time for the first choice of electors by the said several towns, [naming them,] as provided in the said third section of said will, and did further ordain and appoint the 6th day of September then next, as the time for the electors, so first chosen, to hold their first meeting at Northampton, for the choice of the trustees under said will," &c.

The bill then stated that town meetings were duly warned and held, according to said order and appointment of the judge of probate, at which meetings electors were duly chosen, who met on said 6th of September, and elected Osmyn Baker, John Dickinson, jr. (the plaintiffs) and Austin Smith (the defendant) as the three trustees provided for by the third section of said will; that said trustees, so elected, accepted said trust, gave bonds for the faithful discharge of their trust, as required by said will, and organized their board; that the plaintiffs, as a major part of said board, demanded of the defendant, as executor of said will, payment and delivery to said board of the said sum of two hundred thousand dollars, &c. but that he has refused so to do, and assigns the following reason for such refusal, viz. that "by the great delay which attended the probate of said will, a literal compliance with the directions of said testator, respecting the election and organization of said board of trustees, has not been, and cannot be, had, and that he [the defendant] cannot pay over the said moneys, or deliver the said property or securities demanded by the said board, with safety to himself as executor, without the direction of this court for his justification therein."

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The prayer of the bill was, that the defendant might be held to make answer, and to account with the plaintiffs; and that said board of trustees might be declared by the court to be legally established, and for further relief.

The defendant demurred to the bill.

Grennell, (*Aiken* was with him,) in support of the demurrer.

The judge of probate, after the lapse of one year from the decease of the testator, had no authority to appoint a time for the choice of electors, and for their first meeting. The eighth section of the will is thus: "And I further direct, that in case of the entire failure of trustees, from any cause whatsoever, the judge of probate for the county of Hampshire, for the time being, shall have full power and authority to nominate and appoint trustees to hold and manage said property, until other trustees shall be legally appointed in the manner hereinbefore set forth, and authorized to act in their stead." Under the exigence that happened, this provision of the will should have been complied with, or all parties should have waited for a choice of electors at March or April town meetings in 1848. In the mean time, the defendant, as executor, would have had the care of the moneys and securities, and would have been entitled to pay for such care, besides the compensation given him by the will for settling the estate. For, in the *first* section of the will, it is provided, that "if the board of trustees shall not be organized within one year after my decease, a reasonable allowance shall be made to him [the defendant] for managing said funds after that time, till the same shall be paid over to said trustees." There was no necessity, therefore, for any deviation from the literal provision of the will.

The plaintiffs' right to bring this bill is properly raised by demurrer. Cooper Eq. Pl. 166, 167. Story Eq. Pl. (1st ed.) 384 – 386.

Delano, for the plaintiffs. Various clauses in the will show that the testator meant that the trustees should have the exclusive management of the charity. He provided, by the

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eighth section, that "if any of the provisions contained in this will cannot be executed, I hereby devise and bequeath all my property aforesaid to my said executor, and to such trustees as shall be legally appointed, in trust, to be held and disposed of as nearly according to the directions, purposes and objects hereinbefore set forth and provided, as may be consistent with law;" thereby authorizing this court to carry the provisions of the will into effect *cy pres*. And the court would have that authority, without the testator's giving it.

The testator also manifestly intended that the trustees should be organized as soon as practicable, and that his property should thereupon pass from his executor to them.

The general power of the court to carry the provisions of a will into effect *cy pres*, in case of donations to charitable uses, is well established. 2 Story on Eq. §§ 1060, 1061, 1187, 1190, 1191. *Burbank* v. *Whitney*, 24 Pick. 146. *Going* v. *Emery*, 16 Pick. 107. *Sanderson* v. *White*, 18 Pick. 328. *Bartlett* v. *Nye*, 4 Met. 378. 4 Kent Com. (5th ed.) 508, *note*. 2 ib. 288, *note*. *Mayor* v. *Nixon*, 2 Younge & Jerv. 60. *Moggridge* v. *Thackwell*, 7 Ves. 82. 1 Story on Eq. §§ 94, 95. Lewin on Trusts, 423. *St.* 1847, *c.* 263. Hoffm. R. 202.

Shaw, C. J. The question presented in the present case is, whether the complainants were duly appointed trustees under Oliver Smith's will, so as to be entitled to demand and receive the trust fund from the executor. See *Inhabitants of Northampton* v. *Smith*, 11 Met. 390. The court are of opinion that they were not legally constituted the board of trustees.

As the general course, the will is explicit in directing how this board of trustees shall be constituted, by the election of electors or delegates, by the respective eight towns, at the annual meeting in March or April. Then it is provided, as a special exception to this general rule, that the first meetings of the towns for the choice of electors, and also the time of their first meeting, may be directed by the judge of probate

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but such meetings were to be held within one year of the decease of the testator.

This limitation or condition of the power of the judge of probate, to direct meetings to be held within one year of the decease of the testator, became impossible, because more than a year elapsed before the will was established. But we think the power ceased when the year elapsed.

It would have been a convenience, perhaps contemplated by the testator, if the will were proved soon after his decease, without controversy, and no appeal taken, that the board of trustees should be constituted immediately, especially if this should occur soon after the annual town meetings; so that nearly a year would intervene before a regular choice. But it was a convenience merely, and not a necessity; and there was, therefore, no occasion for applying the doctrine of *cy pres*. It was, no doubt, the purpose of the testator to have a board of trustees speedily constituted; but the mode is duly prescribed, and precisely limited. There was no necessity arising from the state of the funds. The testator had provided for that contingency, by providing that the trustee and executor should hold, manage and invest the funds, until the board of trustees should be constituted in the mode directed; and he contemplated that this might extend beyond one year, by providing a compensation to his trustee and executor, if the board should not be constituted within one year.

We mean to express no doubt of the power of the court, as a court of equity, in cases of gifts to charitable uses, when the will cannot be executed precisely according to its terms, to sanction an execution which shall, as nearly as may be, carry into effect the charitable intent, *ut res magis valeat, quam pereat*. But to warrant a deviation from the plain directions of the will, the exigency must exist. Here the power of the judge of probate to appoint the first meetings of the towns was limited to one year, and the year had expired; and there was ample provision for that case.

The power given to the judge of probate, in case of the failure of trustees, is manifestly limited to a case where

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trustees have been appointed. Besides; the express provision, that the judge of probate should exercise this power, in regard to the first meetings, and limiting it to one year, excludes the implication of an intent to confer this power under the general words, giving a like power, without limitation, in the case of *failure* of trustees. And further; in case of the failure of trustees, after they had once been appointed and received the funds, the exigency arising from the want of proper persons to take care of the funds would be much greater than that which would exist before the first constitution of the board; because, until that time, there was an executor and trustee, appointed by the testator, charged with that duty, and competent to preserve and to manage and invest the funds, until a regular election of electors, at the annual town meetings.

Bill dismissed.

Freeman Snow & another *vs.* Inhabitants of Ware.

When a party makes a special agreement to do certain work within a fixed time, and fails to do it in the manner and within the time agreed, yet if he acts in good faith, and the other party receives a benefit from the work which is done, the law implies a promise by him to pay such sum therefor as the benefit which he receives is reasonably worth to him, and he is liable for such sum, in an action of indebitatus assumpsit.

County commissioners ordered a road to be altered and repaired by a town, in a certain manner and within a certain time: The town chose a committee to superintend the alterations and repairs, and to contract for payment therefor: The committee put up the work, at auction, to the lowest bidder, and A. became such bidder, and did work on the road, for which he sued the town, in an action of indebitatus assumpsit: The town gave evidence, in defence, that the committee, when they put up the work at auction, announced that the road was to be made more thoroughly and safely, in certain particulars, than was required by the order of the commissioners, and that A. had not so made the road. *Held*, that A., for the purpose of showing that he performed his work on the road in good faith, might give evidence that he did not hear the announcement of the committee, at the auction, but believed that he undertook to do the work on the road in the manner prescribed by the order of the commissioners.

In an action against a town to recover pay for repairing a road which the county commissioners had ordered to be raised four feet in a certain hollow, the plaintiff may, for the purpose of proving that he had raised the road four feet, as ordered, and in good faith supposed that he had so raised it, give evidence that the commissioners, before they made the order, placed a stake in the ground, and stated

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that they should require the road to be raised as high as the top of the stake, and that the plaintiff had raised the road to that height.

And in such action against a town, though the plaintiff did not finish his work within the time agreed on between him and the committee of the town, with whom he made the agreement, yet if the committee and other principal inhabitants of the town knew that he continued his work after the agreed time for finishing it had expired, and made no objection to his proceeding, the jury may infer that the town had waived the agreement as to time.

INDEBITATUS ASSUMPSIT "for work done, and materials for the same, provided by the plaintiffs, for the defendants, at their request." At the trial in the court of common pleas, before *Wells*, C. J. the plaintiffs claimed compensation for alterations and repairs made by them on a highway situated in the town of Ware, which were ordered, by the county commissioners of Hampshire, to be made, to their acceptance, by the 10th day of November 1843.

The plaintiffs gave evidence that the defendants, on the 25th of September 1843, chose a committee, at a legal meeting, "to superintend the repairs and alterations on the road, [described,] as recently ordered by the county commissioners," and passed a vote that this committee "be intrusted to contract for the payment of the same on the 1st of May 1844;" that the committee, soon after, "offered the said work at auction, to be done by the lowest bidder, and that the job was bid off by the plaintiffs; and that they proceeded to construct the work, but did not finish the same until June or July 1844."

The defendants then introduced evidence tending to show that when the work was let out by the committee, they publicly read the order of the commissioners, and announced that the road must be made as follows, viz. that a sluice should be constructed of stone across the road, at a place designated by them, where it was necessary to carry off the water, and prevent the road from being washed away by freshets; that the road should be raised, in a certain hollow, four feet, by building a stone wall on each side, and filling the space with earth; that said walls should be so far apart as to leave sixteen feet between them for a path to be travelled; and that

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a railing should be constructed, either of stones set upon said wall, two feet apart, and of suitable height, or that poles should be fastened by iron bolts upon large stones to be placed upon said wall. They also introduced evidence tending to show that the road had not been finished so as to conform substantially to any one of the foregoing stipulations.

The plaintiffs thereupon gave evidence tending to show that no such announcement was made when they bid off the work, and that, if it was made, they did not hear it nor know thereof, but believed that nothing more would be required of them than to make the road according to the order of the commissioners. And they introduced evidence of the following facts, as tending to prove that they believed that they had made the road to the acceptance of the commissioners: In June or July 1844, the plaintiffs and the committee met the county commissioners upon the ground, for the purpose of determining whether the road should be accepted. The commissioners directed certain additional filling up of the road to be done, in order to complete the work according to their order, and appointed a time when they would view the road again. This work was done; and at the appointed day two of the commissioners again met the parties upon the ground, and were satisfied that their directions had been complied with; but they directed (as the material used by the plaintiffs would make the road sandy) that two inches of a different soil should be placed upon the top of the road, and stated that if this should be done, they should be satisfied. They further stated, that it was not necessary that more than one commissioner should attend to see if this order were performed. This work was done; and on the appointed day one of the commissioners attended, and expressed himself satisfied that the order had been complied with. The committee attended upon all these occasions, and objected that the contract, in various particulars, had not been performed by the plaintiffs, but did not state, as a ground of objection, that it had not been completed within the time specified by the contract. After this, as well as before, the road was used by the

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public for travel; and neither the committee nor the defendants took any further measures to comply with the order of the commissioners directing the repairs. Some of the committee saw the plaintiffs at work on the road after the 1st of November 1843, and neither they, nor any person in behalf of the defendants, ever gave them notice not to proceed with the work after that time.

The plaintiffs offered to give evidence that the commissioners, before they passed the order for the repairs and alteration of the road, caused a stake to be driven into the ground, in the hollow before mentioned, and stated that they should require the road to be raised as high as the top of said stake; and also evidence that the plaintiffs had raised the road accordingly. The admission of this evidence was objected to by the defendants; but the judge ruled that it was admissible, as tending to prove that the road had been raised to the height of four feet, as ordered by the commissioners, and also as tending to prove that the plaintiffs, in good faith, supposed that they had performed their contract in this particular; and he left it to the jury to determine whether the road had been raised to the height of four feet.

The jury were instructed as follows: "That although the plaintiffs had not completed their work within the time stipulated, yet the jury might consider whether the town had not waived this stipulation: That it was not necessary that the waiver should be by a vote in town meeting, but that, from the fact that the committee saw the work going on, and appeared before the commissioners at the completion, without making any objection on this account, and from the length of time which elapsed from the 10th of November to the completion of the work, it might be inferred that the officers of the town and the principal inhabitants were acquainted with the work, and did not object or give any notice, and that, as neither the committee nor the town took any other measures to comply with the order of the commissioners, the jury, under all the circumstances, were authorized to infer a waiver in regard to this stipulation: That this action might be

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maintained, although the contract had not been performed according to its terms, provided the plaintiffs had, in good faith, done what they believed to be a compliance with the terms of the contract, and had rendered a benefit to the defendants: That if the committee did make the stipulations, as contended by the defendants, yet if the plaintiffs did not know of their having been made, but bid off the contract under the mistaken idea that nothing had been specified in addition to the order of the commissioners, and had, in good faith, performed what they supposed the contract required of them, the action might be maintained, although the commissioners had not legally accepted the work; in which case the rule of damages would be the value of the work to the defendants, taking the sum bid for it as the basis of calculation, and deducting from that sum such an amount as would enable the defendants to complete the road according to the proposals of the committee, and indemnifying them from any loss they had sustained by the failure of the plaintiffs to perform the contract according to the proposals, with interest on the sum thus found, from the date of the writ."

A verdict was returned for the plaintiffs, and the defendants alleged exceptions to the judge's rulings and instructions.

A. L. Devens, for the defendants. The plaintiffs' misconstruction of their contract did not excuse them. *Miller* v. *Lord*, 11 Pick. 24. They were bound to perform the actual contract, in order to recover compensation for their labor.

The evidence as to the height of the stakes was inadmissible; first, because it was hearsay, and secondly, because it was parol evidence, offered to vary a written contract.

There was not a legal acceptance of the road by the commissioners, according to the contract; as only one of their number was present, when the matter was concluded. *Short* v. *Pratt*, 6 Mass. 496.

The road was not finished until long after the stipulated time; and a town cannot waive a stipulation in a contract, except by a corporate vote. See *Taft* v. *Inhabitants of Montague*, 14 Mass. 285. *Keyes* v. *Inhabitants of Westford*, 17

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Pick. 278. *Hayden* v. *Inhabitants of Madison*, 7 Greenl. 76 *School District in Rumford* v. *Wood*, 13 Mass. 198.

The case shows that the plaintiffs did not substantially complete their work; that is, the defendants offered to show this, and it is now to be taken as if it was so proved. The ruling, that if the plaintiffs had done the defendants a benefit, they should recover, was too broad. Substantial performance, unless waived, is a condition precedent to a recovery. 2 Greenl. on Ev. § 104. *Ellis* v. *Hamlen*, 3 Taunt. 52. *Sinclair* v. *Bowles*, 9 Barn. & Cres. 92. *Stark* v. *Parker*, 2 Pick. 267. *Olmstead* v. *Beale*, 19 Pick. 528. *Hunt* v. *Otis Company*, 4 Met. 466. *Davis* v. *Maxwell*, 12 Met. 286. In the case of *Hayward* v. *Leonard*, 7 Pick. 181, a substantial performance was required, and was proved to the satisfaction of the jury.

Delano, for the plaintiffs. This action of implied assumpsit, for work done under a special contract, well lies, on the grounds taken by the judge at the trial. *Hayward* v. *Leonard*, 7 Pick. 181. *Van Deusen* v. *Blum*, 18 Pick. 229. *Smith* v. *Proprietors, &c.* 8 Pick. 178. *Brewer* v. *Inhabitants of Tyringham*, 12 Pick. 547. 2 Smith's Leading Cases, 14, *note*. Good faith in the plaintiffs, and a benefit to the defendants, are the two conditions of a recovery, in a case like this. If so, then the question of waiver is immaterial. See *Lucas* v. *Godwin*, 3 Bing. N. R. 737. 1 Sugd. Vend. (6th Amer. ed.) 295. But the jury have found, if they could so find, that the defendants waived the time of completing the road. See *Inhabitants of Freetown* v. *County Commissioners*, 9 Pick 46, 52. *Inhabitants of Rutland* v. *County Commissioners*, 20 Pick. 81. *Inhabitants of Whately* v. *County Commissioners*, 1 Met. 341. *Drury* v. *Inhabitants of Worcester*, 21 Pick. 44. *Commmonwealth* v. *Inhabitants of Westborough*, 3 Mass. 406. These cases show that a town may make a waiver without a corporate vote.

If there was not a legal acceptance of the road, yet the defendants have waived such an acceptance. But there was a legal acceptance. If the commissioners did not accept the

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road, they should have ordered the work to be finished at the expense of the defendants. Their omission to make such order shows that the work was done to their satisfaction; and this is tantamount to an acceptance, if not identical with it. If there was any thing to be waived by the defendants, their opening of the road, and continuing it open, was a waiver, and they cannot now object that it was not accepted. This would be taking advantage of their own wrong.

Though the case states or assumes that there was not a egal acceptance, yet this is a question of law, on the facts reported, and the plaintiffs are not estopped to insist that there was a legal acceptance, which is not required to be proved by record evidence. See *Bliss* v. *Inhabitants of Deerfield*, 13 Pick. 102. *Inhabitants of New Salem, Petitioners*, 6 Pick. 470.

The evidence, which was objected to, was rightly received, to show good faith in the plaintiffs, and also to fix the point to which the road was to be raised, in the hollow. 1 Greenl. on Ev. §§ 52, 108, 146. *O'Kelly* v. *O'Kelly*, 8 Met. 440.

The rule of damages was correctly stated to the jury. *Hayward* v. *Leonard*, 7 Pick. 181. *Brewer* v. *Inhabitants of Tyringham*, 12 Pick. 547. Sedgwick on Damages, 219, *& note.*

R. A. Chapman replied.

Wilde, J. This is an action of assumpsit, on an implied promise, to recover compensation for repairs and alterations made in a road in the defendant town. These repairs and alterations were made under a special contract, and it is admitted that the work was not completed within the time limited by the contract. We are, nevertheless, of opinion that the plaintiffs are entitled to recover on an implied promise, if the evidence reported was rightly admitted, and if the instructions to the jury were correct. The evidence offered by the plaintiffs had a tendency to prove that the work was done in good faith, and, as the plaintiffs supposed, agreeably to the contract, except as to the time of its completion, and that the defendants had waived the plaintiffs' compliance with their contract in this respect. That this was competent evidence

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according to the doctrine laid down in *Hayward* v. *Leonard*, 7 Pick. 181, cannot be doubted. And we are satisfied that the doctrine there laid down is correct; and that, in the present case, there was no misdirection to the jury. It is true that there are conflicting authorities on the question; but we adhere to the decision in *Hayward* v. *Leonard*, which is conformable to manifest justice, and is supported by the modern authorities.

In *Farnsworth* v. *Garrard*, 1 Campb. 39, Lord Ellenborough lays down the rule thus, after a consultation with the other judges: "I now consider this as the correct rule; that if there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence. The claim shall be coëxtensive with the benefit." In *Chapel* v. *Hickes*, 2 Crompt. & Mees. 214, Bayley, B. says, "the rule is, that if the contract be not faithfully performed, the plaintiff shall be entitled only to recover the value of the work and materials supplied." The same rule is laid down by Parke, J. in *Thornton* v. *Place*, 1 M. & Rob. 219. And in *Read* v. *Rann*, 10 Barn. & Cres. 441, the same learned judge says, "in some cases, a special contract, not executed, may give rise to a claim in the nature of a *quantum meruit*, ex gr. where a special contract has been made for goods, and goods sent, not according to the contract, are retained by the party, there a claim for the value on a *quantum valebant* may be supported; but then, from the circumstances, a new contract may be implied." The same rule is laid down by Starkie, in cases where a complete return and rescinding of the contract are impracticable from the nature of the case. He says, it seems now to be settled, that if the work has been defectively performed, the plaintiff cannot recover but on a *quantum meruit* for the labor, and *quantum valebant* for the materials, to the amount of the benefit actually derived. 3 Stark. Ev. 1768. These and other cases and authorities are cited and discussed in a note in 2 Smith's Leading Cases, 14.

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where the rule is thus laid down, as applicable to cases in which something has been done under a special contract, but not in strict accordance with the terms of the contract: "In such a case, the party cannot recover the remuneration stipulated for in the contract, because he has not done that which was to be the consideration for it. Still, if the other party have derived any benefit from his labor, it would be unjust to allow him to retain that without paying any thing. The law therefore implies a promise on his part to pay such a remuneration as the benefit conferred upon him is reasonably worth; and to recover that quantum of remuneration, an action of indebitatus assumpsit is maintainable."

This rule is applicable to those cases in which the labor has been performed in good faith, and not to those where the party has intentionally, and without necessity or sufficient reason, failed to comply with the stipulations of his contract. The rule, thus limited in its application, is, we think, correct in principle, and is supported by the modern authorities, whatever doubts may have existed in earlier times. And it fully sustains the rulings of the court, and the instructions to the jury, in the present case.

The evidence had a tendency to prove that the labor was performed by the plaintiffs in good faith, and that the defendants cannot, in good faith, object to the non-performance within the time stipulated by the contract. When they had notice that the plaintiff was working on the road after that time, they were in good faith bound to give notice of their objection; and having failed so to do, they must be presumed to have waived it. The question of fact, however, was rightly left to the jury, and the instruction to them was correct. *Exceptions overruled.*

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ITHAMAR CONKEY, Judge, &c. *vs.* AARON DICKINSON & others.

When the same person is executor of a will and guardian of a minor to whom a legacy is given by the will, he holds the amount of the legacy in his capacity of executor, and not as guardian, until he settles an account of his administration, in the probate court, crediting himself, as executor, with the legacy, and charging himself therewith, as guardian: Until such account is allowed by a decree of the probate court, an action cannot be maintained against him and his sureties on his guardianship bond, for neglect to pay the legacy; but an action may be maintained against him and his sureties on the bond given by him as executor.

THIS was an action of debt on a bond, dated September 1st 1834, given to the judge of probate for the county of Hampshire, by Aaron Dickinson, guardian of Medad D. Smith, a minor, and by the other defendants, as sureties for said Aaron, in the penal sum of $2000, conditioned (in the form usually adopted at that date) for the faithful performance, by the said Aaron, of the duties by law required of him, as such guardian.

The action was brought, on the 6th of September 1846, by leave of the judge of probate, for the benefit of said Medad D. Smith, and the following breaches of the condition of the bond were set forth in the declaration: 1st. That although said guardian, after his appointment, became entitled to collect and receive from the estate of Sally S. Dickinson, deceased, a large sum of money, to wit $600, due to him as guardian, yet he did not collect and receive the sum, but neglected so to do. 2d. That said guardian never made and returned a true and perfect inventory of the property of the said Medad D. Smith. 3d. That although said guardian, in the year 1845, had been lawfully required, by the judge of probate, to render a plain and true account of his guardianship, upon oath, and of the property which came to his hands by virtue of his said guardianship, yet he then did not, and never since has, rendered such account, nor any account of his said guardianship. 4th. That although said Medad D. Smith became twenty one years old in the year 1843, and the said guardian has received large sums (amounting in all to

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$2000) in his capacity as guardian, yet he, though requested, had never paid the same, on any part thereof, to the said Medad.

The parties submitted the case to the court upon an agreed statement of facts, in substance as follows: The said Aaron Dickinson, in 1834, was duly appointed guardian of said Medad D. Smith, who was then twelve years old, and who came of age in 1843. The bond declared on was duly executed by the defendants. In 1839, while the guardianship duties of said Aaron continued, Sally S. Dickinson died, leaving a will, in which, after certain legacies to divers persons, said Medad D. Smith, the ward, was made residuary legatee, and said Aaron Dickinson was made executor of said will, which was duly proved and allowed. Letters testamentary were issued to said Aaron, and he gave bond for the faithful discharge of his duties as such executor. On the first Tuesday of July 1840, said executor returned his first and only account, as executor of said will, from which there appeared to be a balance in his hands, as executor, of $451·50. After this action was commenced, to wit, on the 25th of September 1846, said Aaron filed his account of guardianship, in which he did not charge himself with said legacy, and a hearing and examination of the guardian were had, and the judge of probate passed a decree thereon, from which said guardian appealed. At this hearing and examination, Sylvester Maxwell Esq. testified in substance as follows: That he, as attorney of said Medad D., called on said Aaron, in the spring of 1845, for payment of what was due from him to said Medad D., and for his account; that said Aaron, soon after, presented to the witness a paper, as his account of guardianship, in which he charged himself with the legacy given by Sally S. Dickinson to said Medad D., amounting to $365·64, and interest thereon for five years, $109·65. These sums, with other items of credit to said Medad D., in this account, amounted to $1275·93, and the charges against him were $624·68; leaving a balance against said Aaron of $651·25: That the witness and said Aaron compared this

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account with one which the said Medad D. had made out, in which said Aaron was charged with said legacy, as $424·00, and in which the balance against said Aaron was $722·36: That said Aaron, on looking at this account, made out by said Medad D., said it was correct, as taken from his (said Aaron's) book: That the witness drew off the said account, in proper form, and said Aaron afterwards looked at it, and signed it, as guardian, and took it away for the purpose of presenting it to the probate court, without suggesting that he held the funds as executor, and not as guardian.

The said Aaron, upon his examination, on oath, before the judge of probate, stated that he applied the money which was left by Sally S. Dickinson to said Medad D. Smith. towards payment for a farm which he purchased for himself.

Davis, for the plaintiff.

Huntington, for the defendants.

WILDE, J. The question is, whether Aaron Dickinson, who is executor of the last will and testament of Sally S. Dickinson, and guardian of Medad D. Smith, the plaintiff in interest in this suit, which is brought in the name of the judge of probate, is answerable, as executor or as guardian, for a legacy left by the said last will to the said plaintiff in interest. This question has been elaborately argued by counsel; but, in the judgment of the court, it is very clear, that the executor is liable for the payment of the legacy, and that nothing appears in the case which by law discharges him from this liability. And it is equally clear that he is not liable in both capacities. To him it is immaterial whether he is to be charged as executor or as guardian; but to his sureties in his bonds the question is important. And we consider the law to be well settled, that if a legacy is given by will, and the same person is executor and trustee or guardian for the legatee, he is bound to account for the legacy, as executor, if he has sufficient assets, unless he has rendered an account in the probate office, charging himself as trustee or guardian, and that account has been allowed by the probate court. The law was so laid down and settled in *Hall* v. *Cushing*, 9 Pick

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395, 409. That case, it is true, did not necessarily require a decision on that point; but it was supposed that it would become important on a hearing in chancery, and it was therefore argued by counsel, and the question was decided, after full deliberation; and we see no cause to doubt the correctness of the decision.

It was argued, in the present case, for the legatee, that the guardian is to be held liable to account for the legacy, because it was included in a paper intended to be his account of guardianship. This intention is denied by the guardian; but we do not consider the fact material. There could be no transmutation of the assets, until the account was allowed by the probate court, so as to charge the guardianship sureties. If such an account had been rendered, it may well be doubted if it ought to be allowed, unless the guardian would give a new bond. If his sureties on his bond as executor were liable, it was not competent for him to transfer that liability to his sureties on the guardianship bond. And it seems clear that the former sureties were liable. The executor had a right to retain the assets for four years; (Rev. Sts. c. 66, § 3;) and while he thus held them he appropriated them to his own use, which certainly made him, and his sureties on his bond as executor, liable. The assets have never been in the possession of the guardian, and this was caused by the misapplication of them by the executor. Nor are we aware of any means by which the guardian, as such, could have obtained possession. He could not sue himself, and he is not chargeable on the ground that an executor or administrator is chargeable for a private debt which he owes the estate. That principle is grounded on the necessity of the case, and no such necessity exists in the present instance. The legatee might have proceeded against the executor and his sureties, and there seems to be no necessity nor reason for proceeding against the sureties of the guardian.

Plaintiff nonsuit.

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Stephen Shepardson & wife *vs.* Inhabitants of Colerain.

In a highway, running east and west, the wrought path was changed from the south to the north side of the space between the limits of the highway, leaving a steep descent between the new and the old wrought path; and the old path ceased to be a part of the wrought or travelled pathway: At a right angle with said high way, and running therefrom southerly, was a road leading to the house of A., which road, on a certain day, was wholly obstructed by snow; and there was, on the same day, a private pathway made by A., across his fields, from his house to that part of said highway where the wrought and travelled path had been changed, as aforesaid: While the road leading from said highway to A.'s house was thus obstructed, he, knowing all the facts, was travelling, in a sleigh, along the newly wrought and travelled path in said highway, and turned his horse southerly, for the purpose of entering upon said private pathway, and in passing down the descent between the new and the old wrought and travelled path, his sleigh was upset, and he received an injury: He thereupon brought an action against the town that was bound to repair said highway, to recover damages for the injury which he received by reason of a defect therein. *Held*, that the action could not be maintained.

This was an action of trespass upon the case, to recover damages alleged to have been sustained by the female plaintiff, by reason of a defect in a highway, which the defendants were by law bound to repair. The declaration described the highway as "leading from Colerain to Whittingham in Vermont, passing by and near the houses of Daniel Donelson and Timothy Harris;" and the defect complained of was alleged to have existed "between the houses of said Donelson and Harris." The case was tried before *Dewey*, J. and his report thereof was as follows:

It appeared that the highway mentioned in the declaration ran from Donelson's house, westerly, to Harris's house; that, at a point about half way between these houses, another public way or lane, which the defendants were bound to repair, ran from said highway, at a right angle, southerly, to the plaintiffs' house; that there was a path from said lane, beginning near the plaintiffs' house, and running northeasterly, across the plaintiffs' fields, till it came to said highway at a point between said Donelson's house and the said lane; and that this path was made by said Stephen (one of the plaintiffs) for his own convenience. The evidence tended to

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prove that the accident complained of happened at a point between the fences erected on each side of the highway described in the declaration, and directly opposite to the place where said path through the fields entered said highway. There was also evidence tending to prove that, at the place of the accident, the travelled path, many years ago, ran nearer to the fence on the southern side of said highway, than to the fence on the northern side thereof; that the defendants, about twenty years ago, worked a new path for travel, nearer the northern fence, and left a space, of about ten feet, between that and the old path; that some person, in 1845, put several cart loads of stones into the old path; and that, at the time of the accident, the new or northern path was, and for some time had been, the commonly travelled path, and that the old path had become covered with grass; that the new travelled path was higher than the old one; and that from the new travelled path to the old one was a sudden and steep offset.

There was also evidence tending to prove the following facts: That on or about the 26th of November, before the accident, the lane leading from said highway to the plaintiffs' house was obstructed by snow, so as to be impassable; that the plaintiffs thereupon resorted to the path through the fields to the said highway; that the lane was, shortly afterwards, rendered passable, and remained so for a few weeks, when it was again rendered impassable by snow, and so remained until and at the time of the accident; that the plaintiffs then again resorted to said path, for the purpose of passing to and from the said highway; that this path was made where there was but little snow, and was in the most eligible place for said purpose; that the ground to the eastward of the path was not of such a nature as to be convenient or safe for the passage of a sleigh; that on the morning of the accident, the plaintiffs went to the village of Colerain, and on returning, in the evening, they passed, from the eastward, on said highway, to the place of the accident, and there turned to pass down from the then travelled path near the fence, on the northern side of said highway, to the old path, so called, near the

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fence on the southern side, for the purpose of passing into the said path across the fields, on their way to their house; and that, in thus passing down from the travelled path in said highway to the old path, so called, the injury complained of was received; that the alleged defect in said highway was south of the said travelled path, in a place not necessary to be passed over by persons going east or west, but necessary to be passed over by persons wishing to go into the path through the fields, to go to the house of the plaintiffs.

The jury were instructed that they had a right to infer, from the evidence, that the highway extended beyond the limits of the then travelled path; that if the injury arose from any defect, or want of repair, in any part of the wrought portion of the road, or that part appropriated to travelling, the defendants were responsible therefor; that if, upon the highway, running east and west, a suitable and proper road for travellers was made and wrought, safe in its construction, of proper width for travellers to pass and repass, with proper facilities to turn upon said road, and in all respects such that the plaintiffs might have travelled with safety, continuing thereon, and if the lane road, being that commonly used by the plaintiffs to pass from the said highway to their house, was then, and for a long time had been, so obstructed with snow as to be impassable by travellers, and this fact was well known to the plaintiffs at and before the time they commenced their travelling on the day of the accident, and they, while travelling on said highway, turned out of the main road, and passed southerly down a declivity, out of the main road, for the purpose of entering upon a temporary way opened by them upon their own land, and in thus passing from the travelled path of the main road to the way over their land, at a place without the limits of the wrought or made road, but within the limits of the highway, taking the same as bounded by the fences on each side, by reason of an obstruction upon such portion of the highway, without the limits of the wrought or travelled way, the feme plaintiff, while they were thus passing to their own private way

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received the injury complained of, by the upsetting of their sleigh, as alleged in their declaration, the defendants were not responsible for the damage thereby sustained.

The jury returned a verdict for the defendants, and thereby settled the point, that the old path, so called, on the southern side of the highway, had ceased to be a part of the worked or travelled pathway, even if it was within the limits of the highway.

The verdict is to be set aside, if the instructions were not sufficiently favorable to the plaintiffs; otherwise, judgment is to be entered on the verdict.

Alvord, for the plaintiffs. The Rev. Sts. *c.* 25, § 22, give an action to "any person who shall receive an injury in his person or property by reason of any defect or want of repair in any highway," and not for a defect in the wrought part only of a highway. The cases that have been decided as to the wrought part of a road proceeded on the ground that the party complaining was in fault in going out of the wrought part. In the case at bar, the whole fault was in the defendants, as the plaintiffs were obliged to go out of the wrought part, in order to get home. In *Cobb* v. *Standish*, 2 Shepley, 198, it was decided that where the defendants enticed the plaintiff to go out of the wrought way, they were answerable to him for the injury that he thereby received. *A fortiori* the present defendants are answerable; for they compelled the plaintiffs to go out of the wrought part of the road. See also *Green* v. *Danby*, 12 Verm. 338. In *Hannum* v. *Belchertown*, 19 Pick. 311, the injury, for which the plaintiff recovered, was received out of the wrought part of the highway.

Suppose the path in which the accident happened had been through the lane, but had not coincided with the wrought path for summer travel; would not the plaintiffs have a remedy? If they would, then why not now? In the case supposed, as in the actual case, the injury would have been received out of the wrought part of the lane, and by reason of a defect out of the wrought part. And in the actual case,

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as well as in the case supposed, the injury was received within the highway, and within the path appropriated, for the time being, to travel, and appropriated to precisely the same travel in both cases; viz. the lane travel, which the defendants were by law bound to accommodate. Yet the instructions to the jury precluded them from taking this view of the case; inasmuch as they were instructed that the place where the accident occurred must have been the part of the highway appropriated to travel east and west, in order to render the defendants liable.

Aiken, for the defendants. The verdict has negatived all the allegations in the plaintiffs' declaration, which contains no reference to any defect, except in the highway between the houses of Donelson and Harris. The lane is not mentioned. The defect proved, if any, was therefore a defect different from that which was alleged.

Admitting that the plaintiffs received an injury out of the travelled part of the road, yet they are not entitled to a remedy, because they knew all the facts. This is not like the case of a stranger, who comes unexpectedly upon a defect in a highway. This case is not distinguishable from that of *Tisdale* v. *Norton*, 8 Met. 388. Though the injury in the present case was received within the walls enclosing the road, yet it was not received within that part which the defendants were bound to make passable. Towns are not bound to make it safe for travellers to turn from a highway at right angles into a field; nor are they liable to an action, unless they are also indictable. *Howard* v. *North Bridgewater*, 16 Pick. 189.

Dewey, J. It is strongly argued by the counsel for the plaintiffs, that this case does not fall within the principles stated in *Howard* v. *North Bridgewater*, 16 Pick. 189, and *Tisdale* v. *Norton*, 8 Met. 388, and that, upon the facts supposed to be established by the evidence, the plaintiffs might well maintain this action. That it is not enough that the injury be shown to have occurred within the actual limits of the located highway, seems to be well settled by authority

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and upon sound principle. The contrary doctrine would, in effect, require the entire width of the highway to be free from obstructions, and fit for use for the traveller; a burden quite too onerous upon towns, that are bound to keep their roads in repair.

Then it is argued, that towns are bound to furnish safe and convenient roads at all seasons, and if they neglect to do it, they are responsible for all damages occurring within the limits of the road. This must be taken with some limitations, as there may be cases where roads may be impassable and great and dangerous obstructions may exist therein wholly impeding the traveller from passing over the same, and yet no action accrue to the individual, who may thus be deprived of making use of the road. In many cases that may be supposed, the only remedy for such neglect of duty is by an indictment. It is not enough that the highway is defective and out of repair; the party claiming damages must be without fault on his part, and while travelling on the highway receive a direct injury. If the highway is impassable, by reason of some notorious defect, he is not at liberty to enter upon it, and pass over it to the place of the obstruction, and then select a new route over other lands, and travel upon it at the risk of the town, if injured by obstruction on such new route. Nor is it enough that the necessity for taking such other route was occasioned by the neglect of the town to keep their road in proper repair. The case of *Tisdale* v. *Norton* presented such circumstances strongly, but they did not avail. It is true that the injury, in that case, occurred upon the new route, thus taken, without the limits of the highway; and that fact increased the difficulty of maintaining that action. But that case presented, as strongly as the present, the reasonableness and the necessity of the departure from the ordinary travelled way.

It was asked by the counsel for the plaintiffs, whether, if the wrought road through the lane had been obstructed by snow, and there had been used, for the public travel through the lane, some other part of the highway, and by reason of some

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obstruction therein, an injury had been sustained, the party thus injured might not have recovered damages, although travelling without the wrought road appropriated for the summer travel? If he might, it was then inquired, why not here? The cases are by no means parallel. In the case supposed, the path travelled on is, for the time, the made way for travellers passing over the lane; the lane being, throughout its whole length, a public way. The traveller does not leave the ordinary route appropriated for travellers, for the purpose of entering upon a private way. But in the case at bar, there was no such newly appropriated way without the limits of the made way used by the public, for the purpose of continuing their travel upon a public way. The plaintiff left the wrought road, not for the purpose of finding a better road upon the public way, or with a view of continuing to travel upon the highway; but he designedly left the wrought road, for the purpose of continuing his travel upon his private way over his own land. This he might do; but at his peril if injured thereby, he fully knowing the obstruction upon the lane road before entering upon his journey. The way which is set forth in the declaration, as the road out of repair, was found by the jury to have been properly constructed, to have been of proper width for travellers to pass and repass, with proper facilities to turn upon the road, and to have been, in all respects, such a road that the plaintiff might have travelled with safety, continuing thereon.

Could the defendants have been indicted for any want of repair as to this road? Clearly they could not. The defect was elsewhere. It was the lane that was out of repair, and in an unfit state for the traveller to pass thereon; and if the plaintiff had received his injury there, the defendants would have been liable. But the road through the lane is not made the subject of this action. The plaintiff forbore attempting to pass over that part of the way, but did elect to leave the made way of another road, for the purpose of entering upon his private way, induced to do so by reason of the known obstruction in the lane road.

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The court are of opinion that the instructions to the jury were proper, and that judgment must be entered on the verdict for the defendants.

Samuel F. Morse & another *vs.* John S. Reed.

A creditor who proves his claim against his debtor, under proceedings in insolvency, and also the costs which had accrued in a suit commenced on the claim before proceedings in insolvency were instituted, and receives a dividend on the claim, and also such costs in full, is not thereby estopped to contest his debtor's discharge under the insolvent laws, by showing that it is void on any of the grounds upon which those laws provide that it shall be of no effect.

Assumpsit on the money counts. Trial in the court of common pleas, before *Wells*, C. J. who signed the following bill of exceptions:

"The plaintiffs gave evidence sufficient, *prima facie*, to support their action. The defendant relied on two grounds; *first*, on his discharge in insolvency, hereinafter stated; and *second*, on the following facts, which were admitted or proved:

"After the commencement of this action, viz. on the 4th of June 1846, the defendant went into insolvency. On the 2d of July following, the plaintiffs proved, before the master, the demands sought to be recovered in this action, and also the costs which had then accrued in the case; which costs were allowed as a preferred claim. Within six months, the plaintiffs, with other creditors, but not a majority in value, filed their dissent, in writing, to the master's granting a certificate of discharge. After six months from the date of the assignment, the defendant obtained his certificate of discharge in due form of law. On the 15th of May 1847, a dividend of 2½ per cent. was ordered, and subsequently received by the plaintiffs, with the costs aforesaid. The net assets were $127·22, and the amount of debts proved was $4591·88.

"Both parties were desirous of having the validity of the second ground of defence determined, without going into the question of the validity of the discharge. And the court

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ruled that the facts, stated under the second ground of defence, constituted a bar to the present action, and the jury found a verdict for the defendant. To this ruling the plaintiffs except."

Davis & C. Devens, for the plaintiffs.

Aiken, for the defendant.

DEWEY, J. The single inquiry in this case is this: Are the plaintiffs, by reason of proving their claim before the master in chancery, and receiving a dividend thereon from the assets of the insolvent, and also the payment of the costs that had arisen in the case before the proceedings in insolvency, estopped to deny the validity of the discharge, and to avoid the same, by showing such facts as would, under the provisions of our statutes, avoid it as to a creditor who had not proved his claim and received a dividend? The statute provisions on this subject are very stringent. The *St.* of 1838, *c.* 163, § 10, declares that every certificate of discharge, granted to an insolvent debtor, shall be of no effect, if he shall have fraudulently concealed any part of his estate, or made any payment or conveyance with a view of giving a preference to any creditor, &c. And *St.* 1841, *c.* 124, § 3, provides that no certificate of discharge shall be granted, or, if granted, shall be of no effect, if the debtor shall have done certain acts therein enumerated. No exception is made, in either of these statutes, as to the case of a creditor who may have proved his claim and received a dividend. The provisions avoiding a discharge are general, declaring the discharge void, in general terms. It is, therefore, necessarily void as to all creditors. The creditors of an insolvent may well prove their claims and receive their dividends, upon the assumption that the insolvent has, in all respects, truly conformed to the requisites of the laws; that he has concealed no effects, and made no conveyances for the purpose of giving preferences, nor in any way violated the principles of a full and equal distribution of his effects. Acting upon this assumption, the creditor may prove his claim and receive his dividend, without prejudice to his right to avoid the discharge

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of the insolvent, if future developments shall show the commission of those acts, or the neglect of those duties, on the part of the debtor, by reason of which his discharge is rendered invalid. It is no part of the duty of the creditor to assume, in advance, that the debtor has been guilty of fraudulent acts, in violation of the insolvent laws, and to regulate his conduct by such presumption. He may, therefore, prove his claim and receive a dividend, without compromitting his further right to enforce payment of the residue of his demand, if the debtor has obtained his discharge under such circumstances as render it invalid in law.

The cases of *Morse* v. *Lowell*, 7 Met. 152, *Fisher* v. *Currier*, 7 Met. 424, and *Gilbert* v. *Hebard*, 8 Met. 129, cited by the defendant's counsel, do not bear upon the point now under consideration. Those cases have reference only to the effect of voluntarily becoming a party to proceedings in insolvency, by proving debts and receiving dividends, in discharging a debtor who has received his discharge upon a full compliance with all the requisitions of law. They do not touch the further question, whether such proving of a debt and receiving a dividend will estop the creditor from showing the discharge to be invalid in law, for those causes for which the statute declares it void.

The facts stated under the second head of the defence do not, in the opinion of the court, estop the plaintiff from showing the discharge, offered under the first specification, to be invalid in law, and of no effect.

New trial ordered.

David Henry *vs.* Silas M. Flagg.

A. indorsed several notes to B., which were payable in two, three, and more years from date, with interest, and gave B. a written promise to pay him annual interest on the notes, if the makers should not pay it: As the notes became payable, B. received payment from the makers, who refused to pay annual interest thereon: After all the notes were paid, B. brought an action against A. to recover the difference between the amount of annual interest and the interest which had been paid to him. *Held*, that the action could not be maintained.

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Assumpsit on the following promise: "Heath, April 13th 1832. I promise to pay David Henry, or bearer, the annual interest of ten notes which are due by annual payments of ten years, signed by Elijah Flagg and Joshua Flagg, and backed by Silas M. Flagg, in which it is not named that it is compound interest; and this writing is to show that I promise to pay the compound use on said notes, if not paid by the signers. Silas M. Flagg."

The case was submitted to the court upon the statement of facts which follows:

"On the 13th of April 1832, the defendant purchased a farm of the plaintiff, for which he was to pay $1300. He paid about $240 in cash, and indorsed to the plaintiff ten promissory notes, signed by Elijah Flagg and Joshua Flagg, dated February 6th 1832. These notes were payable, one in a year, with interest, one in two years, with interest, and so on, one at the end of each year, with interest; the last falling due in ten years from date. Nine of them were for $100 each, and the last was for $159·50. When these notes were offered to the plaintiff, he objected that they were for simple interest only, and that the interest ought to be annually paid. The defendant then told him that the makers of the notes had verbally promised to pay interest annually, and thereupon gave him the writing on which this action is brought.

"The first four of the ten notes were paid by the makers before they fell due, and the plaintiff claims nothing on those. The other six notes were paid as they became due, with simple interest only, and before this action was commenced. After the last note was paid, the plaintiff demanded of the defendant the annual interest, under the aforesaid written promise.

"The plaintiff made a demand on Elijah Flagg for the annual interest on some of the last six notes, and said Elijah gave the plaintiff notice that he would not pay said interest."

This case was argued at the last September term.

C. Devens & Alvord, for the plaintiff. The promise in

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suit is not objectionable on the ground of usury. *Van Schaick* v. *Edwards*, 2 Johns. Cas. 355. Ord on Usury, 36, 53. Comyn on Usury, Part 1, *c.* 2, §§ 7, 14.

Demand on one of the makers of the notes to pay the annual interest was sufficient to entitle the plaintiff to resort to the defendant, on his promise. Indeed, no demand was necessary. *Lent* v. *Padelford*, 10 Mass. 230. *Dyer* v. *Rich*, 1 Met. 180. *Oxford Bank* v. *Haynes*, 8 Pick. 423. Chit. Con. (5th Amer. ed.) 732 – 734.

Brainard, for the defendant. The agreement on which the action is brought is without consideration, and therefore will not support the action. *Cook* v. *Bradley*, 7 Connect. 57. *Burnet* v. *Bisco*, 4 Johns. 235. But if this ground of defence is not sustained by the court, yet the plaintiff has waived the annual interest, by not calling upon the defendant for it till after the notes were paid. *Barrell* v. *Joy*, 16 Mass. 227. *Hastings* v. *Wiswall*, 8 Mass. 455.

Dewey, J. The case of *Hastings* v. *Wiswall*, 8 Mass. 455, early settled the principle, that upon a note, payable in a certain number of years with annual interest, judgment could be recovered only for simple interest on the principal sum. The question there arose, upon a motion in behalf of the plaintiff, that in entering up the judgment, the interest due by the terms of the note at the expiration of each year should be added to the principal, and interest be cast upon the aggregate, and so from year to year; but this was refused, and simple interest on the principal sum only was allowed by the court. This opinion was reaffirmed, or rather recognized as the existing rule of law, by C. J. Parker, in *Barrell* v. *Joy*, 16 Mass. 227. It was also somewhat considered in the case of *Wilcox* v. *Howland*, 23 Pick. 167, where it was again held that an action will not lie to recover interest upon interest, although a new contract, made after such interest had accrued, (as in the case of a promissory note given for compound interest,) would be a valid promise, and might be enforced. These cases seem to settle the general principle as to the right to enforce payment of compound interest upon

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antecedent contracts, and would preclude a recovery of such interest in the ordinary case of a promise to pay compound interest.

The only further inquiry is, therefore, whether this case falls within the principles settled in the adjudicated cases. It is supposed by the plaintiff that there are elements in the present case, that will materially distinguish it from those alluded to. It is true that the promise, which is the subject of the present action, is a promise to pay the annual interest of certain notes of Elijah Flagg and Joshua Flagg, if the makers of those notes do not make such annual payment of interest. The makers of those notes are not sued, but the party giving the collateral promise to pay annual interest. We perceive no distinction, however, in the principle of the two cases. As a prospective promise to pay compound interest, it is equally objectionable as if made by the makers of the note. The payment of interest on the whole sum might have been enforced by action to enforce the payment of the same at the end of each year, if the plaintiff had seen fit so to do. Not having done so, it is as much to be presumed in this as in the cases of annual interest stipulated for in the note itself, that the party waives such claim for annual interest. Indeed, the same objection, whether it be that of waiver, or that the policy of the law is adverse to compound interest, applies to both cases. The plaintiff, having received the simple interest upon the principal of the notes, which are the subject of the defendant's promise, and having forborne to enforce against the defendant the payment of annual interest from year to year, as he might have done, cannot now enforce the payment of compound interest.

Judgment for the defendant.

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COMMONWEALTH *vs.* WILLIAM CHAPMAN & another.

The publication of a false and malicious libel has always, by the common law of Massachusetts, been an offence punishable by indictment.

THIS case was argued by *Hallett*, for the defendants, and by *Porter*, (District Attorney,) for the Commonwealth. The opinion of the court was delivered, at September term 1848, by

SHAW, C. J. This was an indictment against the defendants for a false and malicious libel, tried before the court of common pleas, and, upon a conviction there, the case is brought before this court, upon an exception which has been most elaborately argued by the learned counsel for the defendants, and which, if sustained, must go to the foundation of the prosecution; namely, that there is no law of this Commonwealth by which the writing and publishing of a malicious libel can be prosecuted by indictment, and punished as an offence. The proposition struck us with great surprise, as a most startling one; but as it was seriously presented and earnestly urged in argument, we felt bound to listen, and give it the most careful consideration; but after the fullest deliberation, we are constrained to say, that we can entertain no more doubt upon the point than we did when it was first offered.

It is true that there is no statute of the Commonwealth declaring the writing or publishing of a written libel, or a malicious libel by signs and pictures, a punishable offence. But this goes little way towards settling the question. A great part of the municipal law of Massachusetts, both civil and criminal, is an unwritten and traditionary law. It has been common to denominate this "the common law of England," because it is no doubt true that a large portion of it has been derived from the laws of England, either the common law of England, or those English statutes passed before the emigration of our ancestors, and constituting a part of that law, by which, as English subjects, they were governed when they emigrated; or statutes made afterwards, of a

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general nature, in amendment or modification of the common law, which were adopted in the colony or province by general consent.

In addition to these sources of unwritten law, some usages, growing out of the peculiar situation and exigencies of the earlier settlers of Massachusetts, not traceable to any written statute or ordinance, but adopted by general consent, have long had the force of law; as, for instance, the convenient practice, by which, if a married woman join with her husband in a deed conveying land of which she is seized in her own right, and simply acknowledge it before a magistrate, it shall be valid to pass her land, without the more expensive process of a fine, required by the common law. Indeed, considering all these sources of unwritten and traditionary law, it is now more accurate, instead of the common law of England, which constitutes a part of it, to call it collectively the common law of Massachusetts.

To a very great extent, the unwritten law constitutes the basis of our jurisprudence, and furnishes the rules by which public and private rights are established and secured, the social relations of all persons regulated, their rights, duties, and obligations determined, and all violations of duty redressed and punished. Without its aid, the written law, embracing the constitution and statute laws, would constitute but a lame, partial, and impracticable system. Even in many cases, where statutes have been made in respect to particular subjects, they could not be carried into effect, and must remain a dead letter, without the aid of the common law. In cases of murder and manslaughter, the statute declares the punishment; but what acts shall constitute murder, what manslaughter, or what justifiable or excusable homicide, are left to be decided by the rules and principles of the common law. So, if an act is made criminal, but no mode of prosecution is directed, or no punishment provided, the common law furnishes its ready aid, prescribing the mode of prosecution by indictment, the common law punishment of fine and imprisonment. Indeed, it seems to be too obvious to require argument, that without the

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common law, our legislation and jurisprudence would be impotent, and wholly deficient in completeness and symmetry, as a system of municipal law.

It will not be necessary here to consider at large the sources of the unwritten law, its authority as a binding rule, derived from long and general acquiescence, its provisions, limits, qualifications, and exceptions, as established by well authenticated usage and tradition. It is sufficient to refer to 1 Bl. Com. 63 *& seq.*

If it be asked, "how are these customs or maxims, constituting the common law, to be known, and by whom is their validity to be determined?" Blackstone furnishes the answer; "by the judges in the several courts of justice. They are the depositaries of the laws, the living oracles, who must decide in all cases of doubt, and who are bound by oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study," "and from being long personally accustomed to the judicial decisions of their predecessors." 1 Bl. Com. 69.

Of course, in coming to any such decision, judges are bound to resort to the best sources of instruction, such as the records of courts of justice, well authenticated histories of trials, and books of reports, digests, and brief statements of such decisions, prepared by suitable persons, and the treatises of sages of the profession, whose works have an established reputation for correctness.

That there is such a thing as a common or unwritten law of Massachusetts, and that, when it can be authentically established and sustained, it is of equal authority and binding force with the statute law, seems not seriously contested in the argument before us. But it is urged that, in the range and scope of this unwritten law, there is no provision, which renders the writing or publishing of a malicious libel punishable as a criminal offence.

The stress of the argument of the learned counsel is derived from a supposed qualification of the general proposition in the constitution of Massachusetts, usually relied on in

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proof of the continuance in force of the rules and principles of the common law, as they existed before the adoption of the constitution. The clause is this: Chap. 6, Art. 1, Sect. 6: "All the laws which have been adopted, used and approved in the province, colony or state of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution."

It is then argued, that it is in virtue of this clause of the constitution, that the common law of England, and all other laws existing before the revolution, remain in force, and that this clause so far modifies the general proposition, that no laws are saved, but those which have been actually applied to cases in judgment in a court of legal proceeding; and unless it can be shown affirmatively that some judgment has been rendered, at some time before the adoption of the constitution, affirmative of any particular rule or principle of the common law, such rule is not brought within the saving power of this clause, and cannot therefore be shown to exist. We doubt the soundness of this proposition, and the correctness of the conclusion drawn from it.

We do not accede to the proposition, that the present existence and effect of the whole body of law, which existed before the constitution, depends solely upon this provision of it. We take it to be a well settled principle, acknowledged by all civilized states governed by law, that by means of a political revolution, by which the political organization is changed, the municipal laws, regulating their social relations, duties and rights, are not necessarily abrogated. They remain in force, except so far as they are repealed or modified by the new sovereign authority. Indeed, the existence of this body of laws, and the social and personal rights dependent upon them, from 1776, when the declaration of independence was made, and our political revolution took place, to 1780, when this constitution was adopted, depend on this principle. The clause in the constitution, therefore, though

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highly proper and expedient to remove doubts, and give greater assurance to the cautious and timid, was not necessary to preserve all prior laws in force, and was rather declaratory of an existing rule, than the enactment of a new one. We think, therefore, it should have such a construction, as best to carry into effect the great principle it was intended to establish.

But further; we think the argument is unsound in assuming that no rule of the common law can be established under this clause of the constitution, without showing affirmatively, that in some judicial proceeding, such rule of law has been drawn in question and affirmed, previously to the adoption of the constitution. During that time there were no published reports of judicial proceedings. The records of courts were very imperfectly kept, and afford but little information in regard to the rules of law discussed and adopted in them. And who has examined all the records of all the criminal courts of Massachusetts, and can declare that no records of such prosecutions can be found? But so far as it regards libel, as a criminal offence, we think it does appear, from the very full and careful examination of the late Judge Thacher, (*Commonwealth* v. *Whitmarsh*, Thacher's Crim. Cases, 441,) that many prosecutions for libel were instituted in the criminal courts before the revolution, and none were ever quashed or otherwise disposed of, on the ground that there was no law rendering libels punishable. In the case of the indictments returned against Governor Gage and others, very much against the will of the judges, those indictments were received and filed, and remained, until non prossed by the king's attorney general. This investigation of the history of the common law of Massachusetts is so thorough, complete and satisfactory, that it is sufficient to refer to it, as a clear elucidation of the subject.

But we think there is another species of evidence to prove the existence of the common law, making libel an offence punishable by law, clear satisfactory and decisive; and that is, these rules of law, with some modification, caused by the

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provisions of the constitution, have been affirmed, declared, and ratified by the judiciary and the legislative departments of the existing government of Massachusetts, by those whose appropriate province and constitutional duty it was to act and decide upon them; so that they now stand upon a basis of authority which cannot be shaken, and must so stand until altered or modified by the legislature.

When our ancestors first settled this country, they came here as English subjects; they settled on the land as English territory, constituting part of the realm of England, and of course governed by its laws; they accepted charters from the English government, conferring both political powers and civil privileges; and they never ceased to acknowledge themselves English subjects, and never ceased to claim the rights and privileges of English subjects, till the revolution. It is not therefore, perhaps, so accurate to say that they established the laws of England here, as to say, that they were subject to the laws of England. When they left one portion of its territory, they were alike subject, on their transit and when they arrived at another portion of the English territory; and therefore always, till the declaration of independence, they were governed and protected by the laws of England, so far as those laws were applicable to their state and condition. Under this category must come all municipal laws regulating and securing the rights of real and personal property, of person and personal liberty, of habitation, of reputation and character, and of peace. The laws designed for the protection of reputation and character, and to prevent private quarrels, affrays and breaches of peace, by punishing malicious libel, were as important and as applicable to the state and condition of the colonists, as the law punishing violations of the rights of property, of person, or of habitation; that is, as laws for punishing larceny, assault and battery, or burglary. Being part of the common law of England, applicable to the state and condition of the colonists, they necessarily applied to all English subjects and territories, as well in America as

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in Great Britain, and so continued applicable till the declaration of independence.

This, therefore, would be evidence, *a priori*, that they were in force, and were adopted by the clause cited from the constitution, except so far as modified by the excepting clause.

That the law of libel existed, at the first migration of our ancestors, and during the whole period of the colonial and provincial governments, is proved by a series of unquestionable authorities; and we are now to inquire, whether by the acts done since the adoption of the constitution — acts of the judiciary and legislature — these laws, with some modification, have not been affirmed and declared in such a manner as to bring them within the provision of the constitution, and make them absolutely binding, until repealed by the legislature.

A trial occurred soon after the adoption of the constitution, in 1791, against Edmund Freeman, a printer in Boston, on an indictment for a libel upon Mr. John Gardiner, then a barrister at law, a justice of the peace, and a member of the house of representatives It was before there were any regular reports of judicial proceedings; but, being a cause which excited much interest, it was reported for the newspapers and magazines, from which a pretty satisfactory account of it can be obtained. A good abstract of it may be found in Judge Thacher's able judgment already cited. This case, in its various aspects, throws much light on the subject of inquiry. The prosecution by indictment was instituted and conducted by Sullivan, attorney general, who had studied and practised the law before the revolution, was a member of the convention that framed the constitution, and was appointed a judge of the supreme judicial court, at its first organization. The trial took place before a full court, composed of Sargeant, chief justice, and Paine, Dana, Sumner and Cushing, justices. The first two must have entered on the study and practice of the law not much later than the middle of the last century, and the others but a few years later, and were men of mature

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years, and practisers of long experience in the law, under the provincial government. Three of these judges had been members of the convention. Their construction, therefore, of this provision, had the force and effect of a contemporaneous exposition. They were eminently within the description of Blackstone, already cited, of judges whose knowledge of that law — the unwritten or customary law — is derived from experience and study, and from being "long personally accustomed to the judicial decisions of their predecessors," and of course qualified to expound and declare the common law. The defence was conducted by Mr. Amory and Mr. Otis, eminent for their learning and talents as lawyers. It is not necessary to state minutely the particulars of this trial. It is sufficient that all the judges regarded the English common law of libel as in force here, and cited freely Blackstone, Hawkins, Cowper's Reports, and other ante-revolutionary writers and cases, as the true and authoritative expounders of the existing law of Massachusetts. Nor was the law contested by the learned counsel for the accused, in their vigorous defence; but they also cited and commented upon similar English authorities.

But we have already suggested that in sanctioning the principles of the common law of libel, as a criminal offence, the court did it with some qualification. Dana, J. in his address to the jury, mentioned that it had been objected to the doctrine of libel, that the truth of the charges cannot be given in evidence, because it is no justification, if it is true. He says this is undoubtedly the rule of law, as established by the courts of Great Britain, yet perhaps the courts here may lay down a different principle; but this must depend upon the construction which they will give to the sixteenth article in the bill of rights, relative to the liberty of the press, and which declares that it "ought not to be restrained in this Commonwealth." But he expressly reserves his opinion upon that subject, because it did not arise in that case, there being no offer to prove the truth of the charges, in defence. This reserve was manifestly founded in this consideration,

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viz. that the clause of the bill of rights might be so construed as to sanction the publication of every thing true, however much it might tend to provoke quarrels and breaches of the peace. Should it be so construed, then it would, to that extent, modify and abrogate the common law, which, it was conceded, prohibited giving the truth in evidence, in defence. It would then be brought within the excepting clause of that other article of the constitution, declaring that all laws heretofore adopted, used and approved, and usually practised on, shal remain in force, such *parts only excepted* as are repugnant to the rights and liberties contained in the same constitution. In the case supposed, that part of the English common law of libel, which, on a criminal prosecution for that offence, prohibits the giving of the truth in evidence, will be abrogated, because repugnant to the constitution relative to the liberty of the press. But the conclusion would be, that the residue of the common law of libel would remain in force.

Afterwards, and after the constitution had been a subject of further judicial consideration, this exception, founded on the clause declaring the liberty of the press, to some extent, though not to the extent intimated by Mr. Justice Dana, was judicially declared, in the case of *Commonwealth* v. *Clap*, 4 Mass. 163. This case was decided by a court composed of Parsons, Sedgwick, Sewall, Thatcher and Parker, every member of the bench being changed since 1791. In this case it was held, that when a man shall consent to be a candidate for a public office, conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office, and that publications *of the truth* on this subject, with the honest intention of informing the people, are not libels. And every man holding a public office may be considered as within the principle. But the publication of a libel maliciously, and with intent to defame, is clearly an offence against law.

This case of *Commonwealth* v. *Freeman*, affirmed by the later case cited, is a striking illustration of the maxim, that

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the exception proves the rule. If there were no law making libel a criminal offence, there would be no question of defence. The adjudication, that a particular clause of the criminal law of libel is excepted by the clause in the constitution, proves conclusively that the general law, subject to such exception, was adopted and affirmed by it.

These decisions have been followed by a long course of prosecutions for libel, as a criminal offence, extending through more than half a century, in which the existence of this rule of common law has never before been doubted by any judge called, in the course of official duty, to act on the subject.

We have suggested that there is another and distinct species of evidence, arising after the constitution, showing that the common law, making libels criminal, and punishing them by indictment, was adopted and continued in force. We alluded to the acts and declarations of the legislature. An act regulating the mode of prosecution and defence, in criminal proceedings for libel, is as clear an admission and declaration of the existence of the law on which such prosecutions are founded, as can possibly arise upon implication. By the Rev. Sts. *c.* 82, § 28, and *c.* 86, § 10, an appeal to this court is allowed to any person convicted in the court of common pleas or municipal court, upon indictment for a libel. This law, it is true, was afterwards repealed by *St.* 1839, *c.* 161; but that does not impair the force of the implication. That implication is just as strong, by providing that on such criminal prosecution there shall be no appeal.

But a more striking declaration, of the same sort, is found in Rev. Sts. *c.* 133, § 6, following, nearly in terms, the *St.* of 1826, *c.* 107, § 1. The provisions are, that "in every prosecution for writing or for publishing a libel, the defendant may give in evidence, in his defence, upon the trial, the truth of the matter contained in the publication charged as libellous; provided, that such evidence shall not be deemed a sufficient justification, unless it shall be further made to appear on the trial, that the matter charged to be libellous was published with good motives and for justifiable ends."

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These provisions, recognizing the existence of the law of libel, and directing the mode of prosecution and defence, are as distinct a declaration and affirmance of that law, on the part of two distinct legislatures, at an interval of ten years from each other, as a statute expressly reciting the adoption and existence of this law. A declaration like this, on the part of the legislature, embracing, as it must, the authority of the governor, as well as the senate and house of representatives, not made to serve a turn, but in the ordinary course of legislation, is entitled to great weight, as evidence of the preëxisting common law.

In *Commonwealth* v. *Clap*, 4 Mass. 167, it was stated by the attorney general, Bidwell, that it was the constant practice of the court, in their charges to the grand juries, to mention libels as a proper subject for their inquiry; and as there was no statute animadverting on this species of offence, he drew the natural conclusion, that it must be in virtue of the common law, that they were so charged. The fact, that it was the practice, so long as grand juries attended the supreme judicial court, so to charge them, is probably still within the recollection of many of the older practitioners.

These declarations of the legislature, and the contemporary exposition of the constitution by the older judges, immediately after its adoption, together with an uninterrupted course of judicial practice to the present time, form a body of proof that the common law, making the publication of a malicious libel a criminal offence, has been adopted in this Commonwealth, entirely conclusive and irrefragable; and he must be a bold judge, who should venture to decide that there is not now, and never has been, any such law, and that all the judgments which have been pronounced by the courts of this State, on convictions for this offence, have been erroneous.

Exceptions overruled.

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Luther Stewart *vs.* Lyman S. Clark.

The provision in Rev. Sts. *c.* 59, § 28, that no conveyance of an estate in fee or for life, nor any lease for more than seven years, "shall be valid and effectual against any other person than the grantor, his heirs, &c. unless it be made by deed recorded," does not dispense with the necessity of a deed, in order to pass an estate for life, even as against the grantor and his heirs.

Action of waste. The plaintiff's declaration alleged that the defendant held a certain messuage (described) in Colerain, as tenant for life; that the plaintiff held the next immediate estate of inheritance therein; and that the defendant "did make waste, sale and destruction in the said messuage," (setting forth the acts of waste,) to the damage of the plaintiff. The trial was before *Wilde*, J. who made the following report thereof:

The plaintiff gave in evidence a lease of the messuage described in his declaration, made by Lewis Clark to Willard Clark, for and during the life of Enos Stewart, and an assignment of said lease, by said Willard, to the defendant. The plaintiff then offered a paper, dated July 1st 1839, purporting to be a lease of the same messuage, made by said Enos Stewart to the said Lewis Clark. This paper was signed by said Enos Stewart in the presence of two subscribing witnesses, and was recorded in the registry of deeds; but it was not acknowledged by him, nor was any seal affixed thereto. The defendant objected to said paper as evidence of a freehold interest in him, on the ground that it was not under seal. And he further objected to its reception, because it was not acknowledged. The judge rejected the paper, and the plaintiff submitted to a nonsuit, subject to the opinion of the whole court.

Aiken, for the plaintiff. The Rev. Sts. *c.* 105, § 1, give an action of waste, against any "tenant for life or years," to "the person having the next immediate estate of inheritance" in the premises on which waste is committed or suffered. The ground taken by the defendant will be now

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as it was at the trial, that he is not shown to be tenant for life, as he is alleged to be in the declaration; because the Rev. Sts. *c.* 59, require a deed, and an acknowledgment thereof, to convey an estate for life, or for more than seven years. But under § 28 of that chapter, the paper in question may be operative, as a writing, against the grantor and his heirs, and convey a life estate.

R. A. Chapman, for the defendant.

Dewey, J. The objection taken to the instrument offered as a conveyance of a freehold interest to Lewis Clark is sound, and must prevail. The instrument is not under seal; is not a deed. As a valid conveyance of a life estate, it should be under seal. Rev. Sts. *c.* 59, § 1. The further provision of § 28, that "no bargain and sale, or other like conveyance of any estate in fee simple, fee tail, or for life, and no lease, for more than seven years from the making thereof, shall be valid and effectual, against any other person than the grantor and his heirs and devisees, and persons having actual notice thereof, unless it be made by a deed recorded," does not dispense with the necessity of passing such title by deed. *Nonsuit confirmed.*

Nathan Himes *vs.* Barnabas A. Howes.

An indenture, by which the child of a town pauper in Rhode Island is bound by the overseers of the poor of the town, conformably to the law of that State, as an apprentice to a citizen of this State, is not valid here, and does not constitute a bar to an action brought here, by the person so bound, to recover of the person, to whom he was bound, payment for labor done during the time for which he was bound.

Indebitatus assumpsit for work and labor. At the trial in the court of common pleas, before *Wells*, C. J. the defendant, after the plaintiff had given evidence of the work for which he claimed payment, introduced an indenture of apprenticeship, (the contents of which sufficiently appear in the opinion of the court,) by which the plaintiff was bound to him, as an apprentice, by an overseer of the poor of the

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town of North Kingston in the State of Rhode Island; and he contended that this indenture constituted a bar to this action, inasmuch as said work was done during the time for which the plaintiff was so bound to him.

The judge ruled that although the indenture was executed conformably to the law of Rhode Island, it constituted no bar to this action, unless the covenants therein contained had been fully kept by the defendant. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions to the aforesaid ruling.

Davis & C. Devens, for the defendant.

Grennell, for the plaintiff.

The defendant's counsel cited, from the laws of Rhode Island, (ed. of 1822,) 274, a provision, empowering overseers of the poor to bind out, by deed indented or poll, to any citizen of that state, or of Massachusetts or Connecticut, as apprentices, to be instructed and employed in any lawful art, trade or mystery, any children whose parents are lawfully settled in and become chargeable to their town.

Dewey, J. In defence to this action, which is indebitatus assumpsit for labors and services alleged to have been performed by the plaintiff, at the request and for the benefit of the defendant, it is contended that the services were wholly rendered under the stipulations contained in certain articles of apprenticeship, under the hands and seals of duly authorized contracting parties, dated November 21st 1831, and that the only remedy of the plaintiff is by an action upon that deed. Upon reference to this deed, it purports to be an indenture between Benjamin Smith, an overseer of the poor of the town of North Kingston, in the State of Rhode Island, and the defendant, a resident of Ashfield in this Commonwealth, in which it is recited "that the said Smith, in his capacity of sole overseer of the poor of said North Kingston, hath put and placed, and by these presents doth put out, Nathan Himes, [the plaintiff,] son of Palmer Himes, one of the poor of said town, an apprentice to said Barnabas A. Howes, [the defendant,] to learn the art, mystery and trade of a

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husbandman, and after the manner of an apprentice, to serve from the day aforesaid, [November 21st 1831,] he being about eight years of age, until he shall be of the age of twenty one years," &c. The defendant, in said indenture, covenanted and agreed to instruct the plaintiff "in the art and calling of a husbandman, and to cause him to be taught to read, write and cipher, and to provide for him, during said term, meat, drink, lodging and clothing, fit and convenient for such an apprentice, and to furnish him with medical aid, when necessary, and at the expiration of said term, to discharge him, and give him, besides his ordinary clothing, a new and decent suit of clothes."

The nature and scope of this contract are very intelligible, and easily understood. Had it been entered into between the defendant and the overseers of the poor of any town within the limits of Massachusetts, and had the minor also been a resident of Massachusetts, and a proper subject for such indenture, such indenture would have been obligatory upon the parties, and might have constituted a good defence to an action of assumpsit for the services of the plaintiff. The inquiry then arises as to the validity and effect of this indenture made by an overseer of the poor in the State of Rhode Island, binding out to service one of its own paupers, or the son of a pauper, to a resident of Massachusetts, known and described as such in the indenture, and obviously intended to authorize the removal of the minor from the State of Rhode Island to the State of Massachusetts. Is such an indenture valid, and to be enforced in Massachusetts? We think clearly not. The very nature of the trust, the source from which the authority to bind out is derived, the duties and obligations resulting from such contract, and the proper supervision of it by the appropriate tribunals, all tend to one view of this question, and clearly show it to be a local indenture, and one that must have its force and effect, as a statutory binding out to service, only within the territorial limits of Rhode Island.

It is said, and truly said, that the statute of Rhode Island

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authorizes the overseers of the poor to bind out to service the minor children of paupers, resident in Rhode Island, to persons resident in Massachusetts. But it is for Massachusetts, and not for Rhode Island, to declare whether such a statute shall have any force and effect in Massachusetts, beyond that of a local provision to be executed within the territorial limits of Rhode Island. It is difficult to perceive how the right of supervision, so plainly required by the statute of Rhode Island, can be exercised, in this Commonwealth, over our citizens resident here. Great practical difficulties would arise in enforcing the provisions of this statute in Massachusetts. But aside from this, considerations of higher importance press upon us, when we are called upon to decide whether this statute can have validity here, authorizing, as it does, a contract to be made, by the overseers of the poor of a town in Rhode Island, with a citizen of Massachusetts, having the avowed purpose of transferring the residence of a minor son of a pauper from Rhode Island to Massachusetts. There are objections to giving effect to such an indenture, that seem to us insuperable. To say nothing of the rights of the minor, which would be violated by a forced removal from the State in which he had his domicil to another State, and, as the case might be, to a State at the other extremity of the Union —for if it be competent for the legislature of Rhode Island to authorize the overseers of the poor in that State to bind out a minor, an inhabitant of that State, to a master resident in Massachusetts, with authority compulsorily to remove him to Massachusetts, it is equally within the legislative authority of Rhode Island to authorize the binding out of such minor to a resident of Arkansas — public policy, and the security of our own Commonwealth, would lead us to pause and gravely examine the subject, before we gave legal effect here to a course of legislation in another State, which might flood this Commonwealth with the pauper children of a sister State.

As it seems to us, statutes authorizing overseers of the poor to bind out minors, by indenture, who are the children

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of paupers, must, from their nature, be of a local character and have effect as police regulations, to be wholly administered within the limits of the State enacting them; that to render such binding to service a valid contract, the parties must all be residents within the State; or at least that the indenture must be one for services to be performed within the State in which it is made.

The indenture, in the case before us, was not binding upon the minor. The court of common pleas, therefore, properly ruled that it constituted no bar to an action of assumpsit for the services of the plaintiff, upon the ground taken by the defendant, that the plaintiff had performed these services under a deed. This is the only ruling to which the defendant can except; and the plaintiff only was prejudiced by the further ruling, which was, substantially, that if the covenants on the part of the defendant had been well and truly performed, that might constitute a good defence to this action upon the merits. Whether this ruling was too favorable to the defendant, it is unnecessary, for the reason just stated, to decide. There are many cases where the principle would be properly applied, that although the contract was invalid in law, and incapable of being enforced, yet the parties having acted under it, it may be shown in evidence, as explanatory of the relation of the parties, and of their intended arrangements; and it may, in some aspects, materially affect the case. The defendant had here the benefit of this indenture, so far as it prescribed the duties and liabilities of the parties, and the jury, under the instructions of the court, could have found a verdict for the plaintiff only upon the ground that the defendant had not fulfilled all the stipulations on his part, which were embraced in the indenture, and which he covenanted to perform.

Upon the whole case, we see no reason to disturb the verdict. *Exceptions overruled.*

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LUTHER BARNARD *vs.* ZEBADIAH GRAVES.

A warrant to collect taxes, issued by assessors to a collector, does not authorise him to collect a tax by distress, unless it is accompanied with a tax list; but it is not necessary that the tax list should be annexed to the warrant.

Though a warrant to a collector erroneously direct him, for want of goods or chattels, whereon to make distress, for the space of twelve days after demanding payment, (instead of fourteen days, as directed by the Rev. Sts. *c.* 8, § 11,) to take the body, &c., yet if the warrant be in other respects sufficient, this error therein will not vitiate it, so as to render illegal a distress made by virtue of it, if, in making the distress, the warrant be executed according to law.

Under the Rev. Sts. *c.* 8, § 8, a collector of taxes, who distrains goods, may post a notification of the sale thereof before the expiration of four days after the seizure.

The return made by a collector, on his warrant, of his doings in making a distress for taxes, is so far an official act, as to be *prima facie* evidence in his favor, on the trial of an action against him for making the distress: And a demand by him of payment of a tax, before he made distress for it, may be shown by his return.

In a collector's return of his doings on a distress for a tax, he stated that he distrained a horse on the 6th of April, and on the 7th of April posted up a notification, at the B. B. House in D., of said distress, and of his intention to sell said horse at public auction at said house on the 11th of April; that he kept the horse four days and more, and posted up said notification more than forty eight hours before the sale, and sold the horse, within seven days after the seizure, at public auction, at said B. B. House, pursuant to said notification: On the trial of an action brought against the collector for taking and selling the horse, the original notification was produced, which was dated April 8th, and stated that the sale would be on the 11th of April, at the house of T. S. S. in D. *Held*, that the variance between the return and the notification was immaterial; that the return must be taken to be true, until it should be impeached; and that, if impeached merely by showing facts which would equally well justify the collector, he might rely on such facts to sustain his justification.

A collector's notification of the sale of a horse, distrained for non-payment of a tax by the owner, need not mention the owner's name, nor describe the horse, nor state the amount of the tax.

When a collector of taxes is also a constable, his notification of a sale by him of personal property, distrained for non-payment of a tax, is not vitiated by his adding to his signature the word "constable," instead of collector.

THIS was an action of trover for a horse, and was tried in the court of common pleas, before *Wells*, C. J. At the trial, the only question was, whether the taking of the horse by the defendant, as collector of taxes for the town of Deerfield, for the year 1845, was legally justifiable. The defendant introduced the records of said town for that year, from which it appeared that the defendant, at the annual town meeting, held in March, was chosen constable and collector of taxes for the ensuing year, and was sworn in both capacities; that assessors were also chosen at the same meeting, and sworn, who assessed a state, county and town tax, and committed the

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tax list to the defendant, with a warrant under their hands, commanding him, (among other things,) in these words: "Levy and collect of the several persons named in the list herewith committed to you each one his respective proportion therein set down." The concluding part of this warrant was in these words: "And if any person shall refuse or neglect, upon demand by you made, to pay the sum he is assessed in the said list, you are to distrain the goods or chattels of such person to the value thereof, and the distress so taken to keep for the space of four days, at the cost and charge of the owner; and if he shall not pay the sum so assessed, within the said four days, then you are to sell openly, at public vendue, the distress so taken, for the payment thereof, with charges; first giving forty eight hours' notice of such sale, by posting up advertisements thereof in some public place in said town, which said notice may be given either before or after the said four days shall have expired; and the overplus arising by such sale, if any there be besides the sum assessed, and the necessary charges of taking and keeping the distress, you are immediately to restore to the owner, with an account in writing of the sale and charges; and for want of goods or chattels to be shown you, whereon to make distress, (besides tools or implements necessary for his trade or occupation, beasts of the plough necessary for the cultivation of his improved lands, arms, utensils for housekeeping, necessary for upholding life, bedding and apparel necessary for himself and family,) for the space of twelve days after demanding the payment of any sum so assessed, you are to take the body of such person so refusing or neglecting, and him commit to the common jail of the county aforesaid, there to remain until he pay the same or such part thereof as shall not be abated by the assessors of said town for the time being, or by the court of county commissioners for the county aforesaid."

The defendant's return on the foregoing warrant is copied in the margin.*

* Franklin ss. April 11th 1846. By virtue of this warrant, and the tax lists committed to me as collector of taxes in and for the town of Deerfield

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The plaintiff objected to the validity of the said warrant, both in regard to its directions for the sale of property and arrest of the body of the plaintiff; but the judge overruled the objection.

The defendant relied on the said warrant, with a tax list for the year 1845, which was not annexed to the warrant, and on said return, as *prima facie* evidence of the facts therein stated, and for his justification of the alleged conversion of the plaintiff's horse; and the judge ruled accordingly.

The plaintiff then gave in evidence the following advertisement posted up by the defendant: "Sale at auction. Taken in distress for taxes, and will be sold at public auction, on Saturday, the eleventh day of April instant, at one of the clock in the afternoon, one valuable horse, unless said taxes shall be settled previous to the time appointed for said sale, at the house of T. S. Sargent, S. Deerfield. Deerfield, April 8th 1846. Zebadiah Graves, Constable." The plaintiff contended that this advertisement was insufficient as a notice of

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for the year of our Lord 1845, by the assessors of said town, having first demanded of Luther Barnard, of said Deerfield, whose name is borne on said list with a tax against him of the sum of five dollars and ninety one cents, the payment of said sum and tax, which the said Barnard refused to pay; I distrained one horse, the property of the said Barnard, for the payment of said tax, and all legal and necessary charges and expenses in consequence of said distress, on the 6th day of April 1846. And on the 7th day of the same April, I posted up a notification at the Bloody Brook House, a public place in said town, as the law directs, of the said distress, and of my intention to sell the said horse, distrained as aforesaid, at public auction at said house, on the 11th day of said April at one o'clock P. M. for the payment of said tax and keeping and sale of the said horse, and legal charges of the same. The aforesaid demand of said tax was made 14 days before making the said distress. And I kept the said distress for the space of four days and more, and posted up said notification more than 48 hours before the sale of said horse, and sold the same within 7 days after the seizure, at public auction at said Bloody Brook House, pursuant to said notification, to William Chapman, he being the highest bidder therefor. The said horse was sold as aforesaid for $70, and the result thereof is as follows: Horse sold, $70·00. Tax, $5·91. Travel in service, 4 miles, $0·16; keeping horse 5 days, $1·25; fees for taking, &c. $0·50; commissions, 4 per cent. of tax, $0·23, = $7·05. Surplus money, $63·05; which I hold for the said Barnard when demanded. Deerfield, April 11th 1846. Zebadiah Graves.

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sale, and also that it so far contradicted and impeached the return aforesaid, as to destroy its effect, even if it were otherwise good *prima facie* evidence of the facts therein stated; but the judge ruled that, notwithstanding this, the defendant had made out a sufficient defence. The defendant offered no further evidence, and the jury found a verdict for him. The plaintiff alleged exceptions to the judge's rulings.

Huntington, for the plaintiff. 1. The warrant was illegal, not being conformed to Rev. Sts. *c.* 7, § 33, which require that it "shall specify the duties of the collector, as required by law." Rev. Sts. *c.* 8, § 8, direct that "the collector shall keep the goods distrained for the space of four days, at the least, and shall within seven days after the seizure sell the same," &c. This seems, in spirit and in terms, to require the keeping of the property four days, at least, before the expense of advertising is incurred. (See *Sts.* 1785, *c.* 70, § 2, and 1791, *c.* 22, § 2, the provisions of which are changed by the revised statutes.) But the warrant in question allowed the defendant to give the notice "either before or after the four days" should have expired; and his return shows that he posted up notice before the four days had expired, to wit, on the next day after the seizure.

The warrant also directed the defendant to seize the body within twelve days after demand; whereas the Rev. Sts. *c.* 8, § 11, do not permit such seizure until fourteen days after demand.

These objections apply to a state of facts alluded to, but which did not exist, in *King* v. *Whitcomb*, 1 Met. 328. In that case, the property was kept four days before the notice was posted up; and the proceedings of the collector conformed to the directions of the law, and were not in conflict with his warrant. In the case at bar, the warrant directed proceedings contrary to law, both as to sale and arrest, and presents the very question which was alluded to, but not decided, in *King* v. *Whitcomb*.

2. The defendant cannot justify under a warrant without a tax list annexed. Rev. Sts. *c.* 7, §§ 31–33. In *St.* 1785,

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c. 50, § 6, the form of the warrant was prescribed, and "the list herewith committed" was mentioned. The warrant is not a warrant, unless the list be annexed to it, any more than a mortgage, referring to a schedule not annexed, is a mortgage of the goods named in the schedule.

3. The defendant's return was not sufficient evidence in justification of his invasion of the plaintiff's property. In *Bruce* v. *Holden*, 21 Pick. 187, a field driver's return was held to be *prima facie* evidence, on the ground that it was an official act, required by the provisions of law. But a collector of taxes is not required by law to make a return; and his return, when made, is not an official act. Neither his oath nor his prescribed duties require him to make returns. See *St.* 1785, *c.* 50, § 6; *c.* 70, §§ 2, 17. Rev. Sts. *c.* 8, §§ 1–14. In *Alvord* v. *Collin*, 20 Pick. 428, the court say, "the employment of a collector cannot be deemed a public office." He "has a single duty to perform, viz. to collect the taxes committed to him." If he is obliged to return his doings as to one tax payer, he is as to every other tax payer in the list. See 1 Greenl. on Ev. § 498.

4. The return, if evidence for any purpose, was not evidence to prove either a demand or notice of the sale. The demand should have been proved *aliunde;* and the return, if it were to prove notice of the sale, should have set forth a copy of the notice, either in terms or substance, and the acts done, and not the inference of law. *Wellington* v. *Gale*, 13 Mass. 483. The effect of the return, as *prima facie* evidence, is impeached or impaired so far as to call for further testimony, (which was not offered,) by the variance between the statement in the return and the date of the notice on its face. The return states that the notice was posted up on the 7th of April; but the notice is dated April 8th. The return states that the sale was made at the Bloody Brook House; but the notice itself mentions the house of T. S. Sargent.

5. The notice of sale was insufficient in many respects *First*, it was signed by the defendant, as "constable," though he was also chosen collector. So far as the plaintiff is

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supposed to know the law, this signature as "constable" directly tended to mislead him; for it implied that the defendant had distrained the property of a person who had removed from another town after a tax had been assessed upon him, under the *St.* of 1842, *c.* 34. *Secondly*, the notice did not state the name of the owner of the property distrained; and therefore the plaintiff was not informed of the proceedings. See *Whitaker* v. *Sumner*, 7 Pick. 551. *Alvord* v. *Collin*, 20 Pick. 421, 431. Rev. Sts. *c.* 8, §§ 22, 23, 25. *Thirdly*, there was no description of the property by which the owner, or any other person, could recognize it, or judge of its value. *Fourthly*, the amount of the tax was not mentioned. The defendant's return showed that the plaintiff's tax was only $5·91; and the defendant had no reason to suppose his "valuable horse" could have been seized for so small a sum. *Fifthly*, the notice is otherwise ambiguous; for it does not distinctly say whether the sale is to be "at the house of T. S. Sargent," or whether the tax is to be paid there.

Grennell, for the defendant. The first two objections to the warrant are answered by the Rev. Sts. *c.* 7, § 33, which provide that it "shall be *substantially* in the form heretofore used," and "shall specify the duties of the collector, as prescribed by law." The form heretofore used, and the duties prescribed in case of distress and sale, are found in *Sts.* 1785, *c.* 50, § 6, and *c.* 70, § 2, and in Rev. Sts. *c.* 8, § 8. And no requisition of the warrant in question is in conflict with the provisions of those statutes. Certainly there is none which made the warrant invalid. The warrant might well have contained a direction to sell a distress within seven days; but this was not necessary. Taking all the directions of the warrant together, they sufficiently conform to the provisions of law.

The direction to arrest the body within twelve days after demand and non-payment was erroneous. The old form under *St.* 1785, *c.* 70, § 2, was used too exactly. But this misdirection could not vacate the whole instrument, nor render the defendant liable to an action for distraining property

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under it. *King* v. *Whitcomb*, 1 Met. 328. *Sanford* v. *Nichols*, 13 Mass. 286.

The Rev. Sts. *c.* 8, § 8, bound the defendant, in the distress and sale, by three leading provisions. 1st. To keep the distress four days at least, at the expense of the owner. 2d. To sell within seven days. 3d. To give notice of the sale forty eight hours before the sale. It is not directed how soon after the seizure the notice shall be posted up. Nor is it declared or implied that four days shall elapse before the notice of sale shall be given.

Now, if the defendant's return is taken as evidence of his acts, no one can see wherein he departed from the precept of his warrant, or disobeyed the commands of the law. The supposed intent of the legislature that the tax payer should not be subjected to the expense of advertising, &c. till four days should have expired, is nowhere apparent. If such intent existed, it would have been easy to express it, for the guidance of collectors.

The law does not require that the tax list should be annexed to the warrant. The Rev. Sts. *c.* 8, §§ 1, 5, speak of a tax list and warrant committed to collectors, but nothing of their being annexed. In the present case, the two papers were under the hands of the same assessors; and the warrant, addressed to the collector, described the list as "herewith committed" to him — simply signifying that they went together into his hands.

The defendant's return or certificate of his doings is evidence in justification thereof. *Eastabrook* v. *Hapgood*, 10 Mass. 313. *Bean* v. *Parker*, 17 Mass. 601. *Bruce* v. *Holden*, 21 Pick. 187, 191. In *King* v. *Whitcomb*, 1 Met. 328, the court admitted a collector's return as evidence of the facts in that case, and spoke of it as proving important facts of which no other proof existed. It would seem necessary that an officer, vested with power, and intrusted with precepts to seize and distrain property, and commit persons to prison, should have the right to return facts for the knowledge of others interested, and for his own protection in his official capacity

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especially as he is under solemn responsibilities. The defendant was sworn as collector and constable.

If the facts certified by a collector are not to be taken as evidence, it follows that he must take witnesses along with him, to witness a demand of payment made by him on half, perhaps all, the persons assessed, and whose names are on his tax bill, if he would protect himself in the matter of distraining property. Who shall pay the witnesses, as such, not as aids, taken about by the collector? This officer must prove the time of making distress, at his peril. If he sell a distress after the seven days next following the seizure, he will be liable as a trespasser. *Pierce* v. *Benjamin*, 14 Pick. 356. This proof as to time must be made *aliunde*, if a demand must.

Collectors, for some purposes, are to make returns to selectmen. Rev. Sts. *c.* 3, §§ 3, 4. An officer's written return proves an attachment, although the writ is never returned to court. *Wilder* v. *Holden*, 24 Pick. 8.

It is objected that the defendant's return, if evidence as to some facts, is not full and particular enough as to the notice of sale. But the court will not hold a collector to stricter rules, in selling goods distrained for taxes, than those by which they hold an officer in returning a sale of goods seized on execution. See *Sprague* v. *Bailey*, 19 Pick. 440.

The variance between the return and the date of the notification cannot impeach the return. The notification was misdated, and the return will govern. The time, in either, would have been sufficient and legal. The Bloody Brook House, and the house of T. S. Sargent — a public hotel — are well known to be the same. See *Thayer* v. *Stearns*, 1 Pick. 109.

As to the alleged defective notice of sale, it is to be observed that the defendant was chosen collector and constable, and was sworn into both offices. His "precinct" was the town of Deerfield, the place of the plaintiff's residence. Rev. Sts. *c.* 15, § 33.

It is objected that the notice did not state the name of the

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owner of the property seized. Is it a grievous wrong, that the defendant did not post his neighbor, at the tavern, for refusing to pay his tax? And was it necessary to describe the animal seized, as minutely as an impounded beast or stray horse should be described? In *Whitaker* v. *Sumner*, cited for the plaintiff, the officer's advertisement mentioned no "place of sale;" omitting what the *St.* of 1798, *c.* 77, § 4, in terms, required to be done, and what was most essential to be done.

DEWEY, J. Various objections are relied upon by the plaintiff, founded upon the irregularity of the proceedings under which the defendant justifies the taking and sale of the property, which is the subject in controversy.

I. As to the objection that the warrant, without a tax list annexed, is no legal authority to collect taxes by distress. No one can doubt but that such tax list must accompany the warrant, must proceed from the same source, and be committed to the collector as a part of the documents constituting the authority for the collection of the taxes. But no precise form of annexation is prescribed, nor is there any requirement, that it be actually annexed, specified in any statute provision. Rev. Sts. *c.* 7, § 32, enact "that the assessors shall commit the tax list, with the warrant, under their hands, to the collector for collection." We think the evidence in this case sufficient to authorize a jury to find that the warrant and tax list were committed as the tax list and warrant for the collection of the tax which was collected, and that there is no ground for exception to any ruling of the court upon that point.

II. As to the form of the warrant. The direction to arrest the body within twelve days after a demand of the tax, if the same should not be paid, although erroneous in form, is of no practical consequence here, as it was not acted upon. The case of *King* v. *Whitcomb*, 1 Met. 328, is an authority, that an omission to comply fully with the requisitions of Rev. Sts. *c.* 7, § 33, that the assessor's warrant shall specify the collector's duties as prescribed by law, will not vitiate a warrant

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if sufficient in other respects, and executed in all respects in conformity to law.

As to the direction in the warrant, that notice of the sale might be given "either before or after four days shall have expired," we see no objection. We are of opinion that such notice may, under the existing laws, be legally given before the expiration of four days after the seizure, a proper time being fixed for such sale.

III. The certificate or return of a collector of taxes is so far an official act, as to his doings upon a levy on personal property, that such certificate or return is to be deemed *prima facie* evidence, in his favor, of the facts stated therein. He is a sworn officer, (Rev. Sts. c. 15, § 33,) and certainly in every respect as much entitled to be protected by his returns as a field driver, whose certificates are *prima facie* evidence as to all matters upon which they are required by law to make returns. *Bruce* v. *Holden*, 21 Pick. 187. Although this case of *Bruce* v. *Holden*, so far as it bears upon the question of the official duty of the field driver impounding beasts for being at large upon the highway, has been overruled, yet the general doctrine of the case, as to the effect of a return made by a field driver in cases where by law it is his duty to make such a return, is sound, and has not been doubted.

We have no doubt that in case of distraining the goods or arresting the body of the debtor, and a commitment to jail, for the non-payment of a tax, it is the duty of the collector to make an official return of his doings, and that, when properly made, he will be entitled to the benefit of the same, as *prima facie* evidence of the facts therein stated.

IV. The demand of the tax may be shown by the return of the collector.

V. The variance is not material between the return and the evidence introduced by the plaintiff to control it. The return is to be taken to be true until impeached; and if impeached merely by showing facts which, if true, would equally well justify the defendant, the variance is immaterial, as the defendant may rely upon such facts as sustaining his

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justification for taking and disposing of the property. Hence, whether the notice of the sale was posted up on the seventh or eighth of April is entirely immaterial. And so, also, as to any supposed variance in the notice actually given, and in the return of the officer, as to the place at which the sale was to be made, it does not seem to be material. It is enough that proper notice was given of the time and place of sale, be it in the one form or the other.

VI. The plaintiff insists that the notice of the sale, which was in fact posted up, and a copy of which he now introduces, was insufficient and defective in many particulars. 1. That it does not state the name of the person whose property was seized. This is not necessary. The seizure and removal of the property are supposed to give effectual notice of the distraining of it, so far as is necessary to the individual whose property is taken. 2. The property taken is not sufficiently described in the advertisement. This objection is not well taken. 3. It is objected that the amount of the tax is not stated in the advertisement. This is not necessary in the case of a distress of personal property for non-payment of taxes; nor do we perceive any ambiguity as to the place of the sale sufficient to render the proceedings illegal on that account. 4. The notice of the sale, as appears from the copy now offered in evidence by the plaintiff, was signed by the name of Zebediah Graves, with the addition of "constable" annexed thereto; and this is supposed to vitiate the notice. This objection is one certainly not as free from doubt as some of the others which have been raised. It seems to us, however, that all reasonable certainty as to the essential requisites of a notice is found in the recitals and signature, in the present case. The officer was both collector and constable. The terms of the advertisement in themselves clearly indicate that the seizure was by virtue of a warrant of distress for taxes, and that the proposed sale would take place only upon non-payment of the taxes. The name of the officer, borne upon the advertisement, pointed out the person who gave the notice, and the recitals apprised all concerned

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that it was a seizure upon a warrant of distress for non-payment of taxes, and not a seizure on execution, nor a sale on an attachment upon mesne process.

Under these circumstances, the court are of opinion that the addition of the word "constable," as found in the advertisement, did not vitiate the notice, and that this ground of exception must also be overruled.

The result is, that all the exceptions are overruled, and that there must be

Judgment on the verdict for the defendant.

DAVID CLARK *vs.* SHALER W. ELDRIDGE.

A. made a note payable to E. at a certain bank, and E. indorsed it in blank to C., who also indorsed it, and put it into the bank; but whether it was discounted by the bank, or was received for collection merely, did not appear: After bank hours, on the last day of grace, the bank gave notice to C. that the note was unpaid, and C., on the same day, put into the post office a notice, directed to E. at his place of residence, in these words: "The note of A., which you indorsed, fell due this day, and remains unpaid. Please let me hear from you in regard to it." *Held*, that this notice was sufficient to charge E. as indorser.

ASSUMPSIT to recover, among other demands, the amount of the following note: "Cabotville, July 17th 1843. Six months from date, I promise to pay S. W. Eldridge or order, at the Farmers & Mechanics Bank, Hartford, one hundred forty five dollars, value received, with interest. Leonard Arms." At the trial in the court of common pleas, before *Ward*, J. it appeared that this note was indorsed in blank by Eldridge, the payee, and was afterwards indorsed by the plaintiff and left in said Farmers & Mechanics Bank. It did not appear whether the note was discounted by the bank, or was left for collection. On the 20th of January 1844, after bank hours, proper notice was sent by the bank to the plaintiff, that the note was due and unpaid; and he thereupon immediately caused a notice to the defendant to be written, in the words that follow: "Hartford, January 20th 1844. Mr. S. W. Eldridge. Dear Sir: The note of Leonard

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Arms, which you indorsed, fell due this day, and remains unpaid. Please let me hear from you in regard to it. D. Clark, per Church, Jr." This notice was directed to the defendant, at Cabotville, where he resided, and was mailed on the day of its date. The defendant contended that the above notice was not sufficient to charge him as indorser; but the judge ruled otherwise. The jury found a verdict for the plaintiff, and the defendant alleged exceptions to said ruling.

Griswold, for the defendant. 1. The *form* of the notice was defective and insufficient. It stated neither the date, nor the amount of the note, nor the promisee, nor the place where payable, nor that it was negotiable, nor who was the holder. *Mills* v. *Bank of U. States*, 11 Wheat. 431. In the case of *Rochester Bank* v. *Gould*, 9 Wend. 279, notice to an indorser was held sufficient, chiefly on the ground that no other note of the same maker, indorsed by the defendant, was in the bank. That fact does not appear in the present case. Besides, in that case, the defendant was informed, by the notice, that the holders looked to him for payment. In the case at bar, it ought to have been left to the jury to decide whether the notice was sufficient to inform the defendant that it was the note in suit which was unpaid.

2. The notice was defective *in substance*. It ought to have shown that the note was dishonored. The maker had all the bank hours of the last day of grace in which to pay the note; and it does not appear at what hour the notice was made out. The notice came from the plaintiff, and not from the bank, and the defendant might suppose that the plaintiff was the holder. The defendant should have been informed, by the notice, that the bank had given notice, or that the note was in the bank. Mere notice that the note was unpaid was insufficient. The request that the plaintiff might hear from the defendant, in regard to the note, did not show that the plaintiff looked to the defendant for payment. *Gilbert* v. *Dennis*, 3 Met. 495. *Bank of U. States* v. *Carneal*, 2 Pet. 543. *Pinkham* v. *Macy*, 9 Met. 174.

C. Devens, for the plaintiff. The plaintiff was the last

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indorser, and had received notice of non-payment by the maker. There was no misdescription of the note, in the notice to the defendant; and particulars were stated, sufficient to put the defendant on inquiry. This is all that was necessary. 3 Met. 498. Story on Notes, § 349. *Smith* v. *Whiting*, 12 Mass. 6. *Bank of Rochester* v. *Gould*, 9 Wend. 279. *Cooke* v. *French*, 10 Adolph. & Ellis, 131. Notice of non-payment was notice of dishonor. The note was in the bank, and presentment and demand were unnecessary. The maker was bound to pay at the bank, and his omission to pay there was dishonor. *Gilbert* v. *Dennis*, 3 Met. 497. The words "let me hear from you" gave sufficient notice to the defendant that the plaintiff looked to him for payment. 3 Met. 498, 499. Story on Notes, § 353. *Grugeon* v. *Smith*, 6 Adolph. & Ellis, 499, and 2 Nev. & P. 303, *Aiken*, in reply. In all the cases in which non-payment at a bank has been held to be dishonor, the bank was the holder; and this distinguishes the case at bar from those. This distinction was taken in *Bank of U. States* v. *Carneal*, 2 Pet. 543. As between the plaintiff and defendant, the plaintiff is to be considered as the holder. The defendant indorsed the note to him, and had no knowledge that it was ever out of his hands.

All the facts stated in the notice may be true, and yet the note not dishonored. If so, the notice is insufficient. 3 Met. *ubi sup.*

Shaw, C. J. This case, we think, is distinguishable in principle from *Gilbert* v. *Dennis* and *Pinkham* v. *Macy*, although it runs very near them. Here it was not necessary to prove presentment and demand. The note was indorsed to, and deposited in, the bank by the plaintiff, and remained there, unpaid, through the last day of grace. The bank had full authority to receive payment and surrender the note, whether discounted or received for collection; and that point seems wholly immaterial. Then the only question is, whether the defendant, as indorser, had due notice. It was given seasonably, by a party competent to give it, and sent

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to the right place; and the question is upon the form of the notice.

The note was payable at a place certain, a bank named, and being left there for payment, it was dishonored, if not paid during the bank hours. The fact that it was so payable was known to the defendant, as payee and indorser, and he himself indorsed it to the plaintiff. Now, whether the plaintiff held it in his own right, or discounted it with the bank, it was still payable at the bank; and the ordinary presumption would be, that it was there, whether the bank or the plaintiff was the holder. When, therefore, the notice informs the defendant that the note "*fell due* this day, and *remains* unpaid," being equivalent to saying that it fell due *at the bank*, and remains unpaid, it carries an implication, to one having such knowledge, that the letter was written after bank hours, and therefore did, by reasonable implication, inform the indorser that it was dishonored.

As to the other point, taken in the argument, that the question of identity of the note sued and the note referred to in the notice was partly a question of fact, on which the defendant was desirous of going to the jury, it does not appear, by the bill of exceptions, that any such ground was taken at the trial, or any such question of identity raised. It is too late to take it now. *Exceptions overruled*

Luke Hart & others *vs.* The Western Rail Road Corporation.

A shop, adjoining a rail road track, was destroyed by fire communicated by a locomotive engine of a rail road corporation; and while the shop was burning, the wind wafted sparks from it, across a street, sixty feet, upon a house, and set it on fire, whereby it was injured. *Held*, that the owner of the house was entitled to recover of the rail road corporation the damages caused by the fire, under St. 1840, c. 85, § 1, which provides that when any injury is done to a building of any person "by fire communicated" by a locomotive engine of a rail road corporation, the said corporation shall be responsible, in damages, to the person so injured.

A.'s house, which was insured, was injured by a fire communicated by a locomotive engine of a rail road corporation, and the underwriters paid to A. the amount of

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Hart & others v. Western Rail Road Corporation.

his loss, for which the rail road corporation was also by law responsible to him. *Held*, that such payment did not bar A.'s right to recover also of the rail road corporation, and that A., by receiving payment of the underwriters, became trustee for them, and, by necessary implication, made an equitable assignment to them of his right to recover of the rail road corporation; and that the underwriters, on indemnifying A., might bring an action, in his name, for their own benefit, against the rail road corporation, and that A. could not legally release such action.

This was an action of trespass upon the case, founded on *St.* 1840, *c.* 85, to recover the amount of a loss which the plaintiffs sustained by a fire alleged to have been communicated to their dwelling-house by a locomotive engine of the defendants. The parties submitted the case to the court, on the following agreed facts:

"On the 9th of July 1845, a carpenter's shop, owned by William W. Boyington, adjoining the rail road track of the defendants, near their passenger depot in Springfield, was destroyed by fire communicated by the locomotive engine of the defendants. There was a high wind, which wafted sparks from this shop, while it was burning, over Lyman Street, sixty feet, upon the dwelling-house of the plaintiffs, and set it on fire, whereby it was partially consumed.

"The plaintiffs were insured by the Springfield Mutual Fire Insurance Company, who requested the plaintiffs to commence a suit against the defendants, to compel payment by them of the plaintiffs' loss, and offered to indemnify the plaintiffs from costs, and to save them harmless, in reference to said suit. The plaintiffs refused to commence a suit, as requested, but demanded the amount of their loss of the said insurance company, who paid the same, first notifying to the defendants that they did not intend thereby to relinquish any claim which they might have against the defendants for the amount, in their own or in the plaintiffs' names. The insurance company, in the name of the plaintiffs, then brought this action to recover the amount paid by said company to the plaintiffs. After the action was commenced, and before the entry of the writ, the plaintiffs executed an instrument, declaring that they had received payment of their loss, of the insurance company; that they had no claim against the

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defendants; that they (the plaintiffs) had not authorized the commencement of this action against the defendants, and did not wish to have it prosecuted; and fully releasing any claim which they might have against the defendants on account of said loss.

"At the May term of this court, in 1847, the case was opened to the jury, and the defendants presented the aforesaid release from the plaintiffs, and contended that the insurance company, in consequence of this release, could not maintain this action. The court ruled, that receiving payment of the loss by the plaintiffs of the insurance company, constituted an equitable assignment, by the plaintiffs, to the company, of any claim they might have had. Whereupon the parties agreed the facts before recited in relation to the origin of the fire.

"In case the court are of opinion, that receiving payment, by the plaintiffs, of the insurance company, amounted to an equitable assignment by them of any claim they might have had against the defendants; that the release referred to was in fraud of the insurance company; and that the defendants are liable for the loss, on the facts stated, the plaintiffs are to have judgment for the sum of $623·65 damages, and interest on this sum, from the 14th of November 1845. Otherwise, the plaintiffs are to become nonsuit."

J. Willard & R. A. Chapman, for the plaintiffs. By *St.* 1840, *c.* 85, § 1, "when any injury is done to a building, or other property, of any person or corporation, by fire communicated by a locomotive engine of any rail road corporation, the said rail road corporation shall be held responsible, in damages, to the person or corporation so injured." And the question now is, whether underwriters, who have paid a loss caused by a fire so communicated, can come in, by subrogation, and recover of the rail road corporation, in the name of the assured, the amount of such loss. The following authorities show that they can. *Tyler* v. *Ætna Fire Ins. Co.* 12 Wend. 507, and 16 Wend. 397 *& seq.* 1 Phil. Ins. (1st ed.) 164. 2 ib. 282. *Godsall* v. *Boldero*, 9 East, 72. *New York*

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Ins. Co. v. *Roulet*, 24 Wend. 505, 516. *Richardson* v. *Washington Bank*, 3 Met. 536. *Carpenter* v. *Providence Washington Ins. Co.* 16 Pet. 495. *Bryant* v. *Dana*, 3 Gilman, 349.

In such case, the nominal plaintiff cannot legally discharge the claim. *Dunn* v. *Snell*, 15 Mass. 481. *Parker* v. *Grout*, 11 Mass. 157, *note*. *Jones* v. *Witter*, 13 Mass. 304.

Phelps, for the defendants. To constitute an equitable assignment, there must be some written agreement, or some order, showing a transfer for the benefit of the assignee. 2 Story on Eq. § 1047. *Morton* v. *Naylor*, 1 Hill (N. Y.) Rep. 583. In all the cases, in this Commonwealth, in which an assignment has been supported, there has been some act of the assignor. See 15 Mass. 11 Mass. and 13 Mass., cited for the plaintiffs. *Eastman* v. *Wright*, 6 Pick. 316. *Dennis* v. *Twitchell*, 10 Met. 180. In the case at bar, the plaintiffs refused to assign their claim, and gave a release to the defendants, on receiving payment of their loss.

It is said that the doctrine of subrogation does not rest on agreement, but on natural equity. Most of the cases in this Commonwealth are cases of sureties, where the equity is manifest. But the defendants are not sureties for the insurance company. And what equity is there that the insurance company, which has received its premium for insurance, should receive full indemnity from the defendants, who are involuntarily liable by a kind of penal statute?

The defendants are liable for loss by fire, if at all, only by virtue of *St.* 1840, *c.* 85; and this statute is to be construed strictly, because it takes away from the defendants a common law right. The fire, against which the plaintiffs were insured, was not "communicated by a locomotive engine" of the defendants to their building, but from the house which was set on fire by sparks from the engine. The proximate cause of the fire, and that cause only, should be regarded. Otherwise, the defendants might be made liable for the burning of a whole city.

The decision was made at September term 1848.

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SHAW, C. J. This is an action of first impression, and is, we believe, the first brought upon the *St.* of 1840, *c.* 85, involving the present question. The action is brought, in fact, by the Springfield Mutual Fire Insurance Company, for their own benefit, in the name of the present plaintiffs, under the circumstances mentioned in the agreed statement of facts, on which the case was submitted to our decision.

1. The first question in order, it appears to us, is, whether, upon the facts stated, the defendants were liable to any body, and for any loss, by force of *St.* 1840, *c.* 85; the defendants insisting that the case is not within the statute. The statute provides, § 1, that "when any injury is done to a building or other property of any person or corporation, by fire communicated by a locomotive engine of any rail road corporation, the said rail road corporation shall be held responsible, in damages, to the person or corporation so injured."

It is contended that the plaintiffs' building was not burnt by fire communicated by a locomotive engine, within the meaning of the statute. And the case certainly presents a question of great importance, and of great difficulty. On the one hand, if the word "communicated" is used in the broad sense in which, without force or violence done to the language, it may be, to include all burnings, when a fire is communicated by the engine directly to one building, and thence by natural and ordinary means extending to others, without the intervention of any other means, the effect would be to charge the rail road company with damages to an unlimited amount, when a fire, thus originating in a village or city, has spread into a wide conflagration. The argument is earnestly urged, that the legislature could not have intended to impose a responsibility so serious and alarming; and it is insisted that the term "communicated" will bear, and ought to receive, a construction more limited, so as to restrain the operation of the statute to the case where the very particles of fire which fall upon, and kindle the flame in, the building burnt, must have emanated from the engine itself, without the intervention of any other object. If so restricted a sense as the

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latter had been intended by the legislature, it seems strange that they did not add some qualifying word, as "immediately" or "directly," to the word "communicated." Perhaps some light may be derived from a subsequent clause in the same section of the statute, which provides, that "any rail road corporation shall have an insurable interest in the property for which it may be so held responsible, in damages, *along its route*, and may procure insurance *thereon* in its own behalf." These latter words, we think, describe buildings being near and adjacent to the route of the rail road, so as to be exposed to the danger of fire from engines, but without limiting or defining any distance. In this view of the statute, it seems difficult to lay down any general rule. From the language made use of, we cannot think it was intended to limit its operation to the very first building which might be touched with a spark or other fire from the engine, and not extend it to another building, contiguous though it may be, but belonging to another owner, which must necessarily burn with it.

In the present case, the fire was transmitted, by ordinary and natural means, from the shop first touched by sparks from the engine, to the plaintiffs' dwelling-house, immediately across a street not very wide. The building burnt was, then, near the route of the rail way. Under these circumstances, the court are of opinion, that the plaintiffs' house was injured by fire communicated by the locomotive engine of the defendants, within the true meaning of this statute, and that they are thereby held responsible, in damages, to the plaintiffs, the persons injured.

2. The next question is, whether the insurance company, having, pursuant to their contract of indemnity, paid the loss to the plaintiffs, are entitled to maintain this suit in the plaintiffs' name, but for their own benefit, to recover the damages to which the defendants are liable by the statute.

We consider this to be a statute purely remedial, and not penal. Rail road companies acquire large profits by their business. But their business is of such a nature as necessarily to expose the property of others to danger; and yet, on

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account of the great accommodation and advantage to the public, companies are authorized by law to maintain them, dangerous though they are, and so they cannot be regarded as a nuisance. The manifest intent and design of this statute, we think, and its legal effect, are, upon the considerations stated, to afford some indemnity against this risk to those who are exposed to it, and to throw the responsibility upon those who are thus authorized to use a somewhat dangerous apparatus, and who realize a profit from it. This indemnity, provided by law against a special risk, may be considered as a quality annexed to the estate itself, and passing with it to any and all persons who may stand in the relation of owners, however divided and distributed such ownership may be. The effect of the statute is, to diminish the specific risk to which such buildings may be exposed, from their proximity to the railroad, and in this respect to put them upon an equality with other risks.

Now, when the owner, who *prima facie* stands to the whole risk, and suffers the whole loss, has engaged another person to be at that particular risk for him, in whole or in part, the owner and the insurer are, in respect to that ownership and the risk incident to it, in effect one person, having together the beneficial right to an indemnity provided by law for those who sustain a loss by that particular cause. If, therefore, the owner demands and receives payment of that very loss from the insurer, as he may, by virtue of his contract, there is a manifest equity in transferring the right to indemnity, which he holds for the common benefit, to the assurer. It is one and the same loss, for which he has a claim of indemnity, and he can equitably receive but one satisfaction. So that, if the assured first applies to the rail road company, and receives the damages provided, it diminishes his loss *pro tanto*, by a deduction from, and growing out of, a legal provision attached to, and intrinsic in, the subject insured. The liability of the rail road company is, in legal effect, first and principal, and that of the insurer secondary; not in order of time, but in order of ultimate liability. The assured may

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first apply to whichever of these parties he pleases; to the rail road company, by his right at law, or to the insurance company, in virtue of his contract. But if he first applies to the rail road company, who pay him, he thereby diminishes his loss, by the application of a sum arising out of the subject of the insurance, to wit, the building insured, and his claim is for the balance. And it follows, as a necessary consequence, that if he first applies to the insurer, and receives his whole loss, he holds the claim against the rail road company in trust for the insurers. Where such an equity exists, the party holding the legal right is conscientiously bound to make an assignment, in equity, to the person entitled to the benefit; and if he fails to do so, the *cestui que trust* may sue in the name of the trustee, and his equitable interest will be protected.

But we think this position is exceedingly well sustained by authorities. A case very much in point, in principle, is that of *Mason* v. *Sainsbury*, first reported as a manuscript case, in Marshall on Insurance, (1st Amer. ed.) 691, and since in 3 Doug. 61. It was an action against the hundred, brought on the riot act, to recover damage sustained by the plaintiff in the riots of 1780. The plaintiff had an insurance on which he had recovered, the insurance office having paid him without suit; and this action was brought in the name of the plaintiff, with his consent, for the benefit of the insurance company. It was decided by Lord Mansfield, and the whole court, that the plaintiffs were entitled to recover. Buller, J. said it was to be treated as an indemnity, in which the principle is, that the insurer and the insured are as one person, and the paying by the insurer, before or after, can make no difference. The same doctrine was fully recognized by the court of king's bench, in 1823, in the case of *Clark* v. *The Hundred of Blything*, 3 Dowl. & Ryl. 489, and 2 Barn. & Cres. 254. It goes upon the ground, that the hundred are liable at all events, and the private contract of insurance, dividing the risk, makes no difference in the owner's right to recover. It was likened by Lord Mansfield and Ashhurst, J. in 3 Doug

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61, to the case of abandonment, in marine insurance, where the insurer is constantly put in the place of the insured.

A similar case afterwards came before the court of common pleas, in 1838, and was very elaborately argued, and the principle above stated confirmed. *Yates* v. *Whyte*, 4 Bing. N. R. 272, and 5 Scott, 640. It was a case of collision at sea, in which the plaintiff claimed damages, sustained by reason of the defendant's vessel having run foul of his vessel, through the defendant's negligence. The plaintiff had recovered of the underwriters on his vessel a certain sum for the same loss, and the defendant contended that this sum should be deducted; but it was held that this was no answer, and that the sum thus paid by the insurers ought not to be deducted. This case was also distinguishable from the former in this respect; that, in this, the suit was not brought at the instance of the insurers. But the court clearly intimated, that the owners, having an absolute right, could recover their damages in that suit, and that if, under an indemnity against the same loss, he had already received payment, the money recovered in this suit would be held in trust for the insurers who had thus paid. It would be in the nature of salvage, received by the assured after payment of a total loss. This was distinctly held by Lord Hardwicke, in *Randal* v. *Cockran*, 1 Ves. sen. 98. Where owners of vessels, unjustly captured by the Spaniards, had received compensation from the underwriters, and afterwards, upon letters of marque and reprisal, granted by the government against the Spaniards, the owners received compensation, it was decided that the owners held the money, so received, in trust for the underwriters, in the nature of salvage. This was a case in chancery; but where the same principle can be carried into effect in the ordinary forms of proceeding, in a court of law, the same principle will be applied. If the trust consists in an equitable liability to pay money, it will be recognized and enforced in a suit at law.

It is clear that the assured has a right to recover against the insurer, although he has a remedy, at the same time, against the party by law liable. Thus, in *Cullen* v. *Butler*, 5 M. &

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S. 466, it is stated, by Lord Ellenborough, that it is no objection to the plaintiff's right to recover of the underwriter, that he may have a right also to recover against the person by whose immediate act the damage was occasioned. This being true, and it being also true, that a recovery against the underwriter is no bar to a suit by the assured against the party primarily liable, it follows, as a necessary consequence, that after a payment by the insurer, by compulsion of legal process or voluntarily, the assured becomes trustee for the insurer, and by necessary implication makes an equitable assignment to him of the right so to recover. See opinion of Kent, C. J. in *Gracie* v. *New York Ins. Co.* 8 Johns. 245.

There is a more recent case bearing upon the question of the right of underwriters, after payment of a loss, to claim salvage, obtained by the assured, the result of which may seem opposed to the above cases, because the underwriters did not recover back. *Brooks* v. *Mac Donnell*, 1 Y. & Coll. Exch. Rep. 500. But it will appear, from that case, that the doctrine herein above stated was affirmed at the bar and by the court; and that the case was decided upon the ground that an abandonment had been refused, and a certain sum had been paid, by agreement, as a compromise of all claims on both sides.

In regard to the right of the insurance company to sue in the name of the assured, we think the cases fully affirm the position, that by accepting payment of the insurers, the assured do implicitly assign their right of indemnity, from a party liable, to the assured. It is in the nature of an equitable assignment, which authorizes the assignee to sue in the name of the assignor, for his own benefit; and this is a right which a court of law will support, and will restrain and prohibit the assignor from defeating it by a release. The formal discharge, therefore, given by the nominal plaintiffs, is not a bar to the action. See *Payne* v. *Rogers*, 1 Doug. 407. *Whitehead* v. *Hughes*, 2 Crompt. & Mees. 318. *Phillips* v. *Clagett*, 11 Mees. & Welsb. 84. *Timan* v. *Leland*, 6 Hill, 237 Browne on Actions, 105. *Judgment for the plaintiffs.*

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF WORCESTER, OCTOBER TERM 1847, AT WORCESTER.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. SAMUEL S. WILDE, } JUSTICES.
HON. CHARLES A. DEWEY, }

MANASSAH S. FORBUSH *vs.* FRANKLIN LOMBARD.

A declaration, in an action of trespass *quare clausum fregit*, described the close as bounded northerly by land of S. and others, easterly by the old N. B. Turnpike, southerly by the road leading to W., and westerly on W. River. *Held*, that this description sufficiently complied with *St.* 1839, *c.* 151, § 3, which requires that "the close or place of the alleged trespass shall be designated by name or abuttals, or other proper description."

By a grant of a mill, the land under the mill, and land adjacent thereto, so far as necessary to its use, and commonly used with it, and no further, will pass by implication: So of an exception of a mill from a grant of land.

A. granted to B., by deed, a tract of land, bounded on all sides by the lands of persons named, excepting therefrom "the mills and water privileges" then owned by A.: At the time of this grant, about an acre of land lay common and unfenced, as a mill yard, and was used for putting timber thereon, and for passing and repassing to and from the mills, but part of that acre was afterwards used, by the owners of the mills, for a garden, and for the site of buildings not connected with the mills. *Held*, that the land which had been thus used for such buildings and for a garden was not within the exception in A.'s deed.

TRESPASS for breaking and entering the plaintiff's close, described in his declaration as "lying in the northerly part of

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Westminster, bounded northerly by land of Franklin Smith and others, easterly by the old North Branch Turnpike, southerly by the road leading to Westminster, and westerly by Whitman River." The declaration alleged that the defendant dug up and subverted the plaintiff's soil, and erected thereon three small buildings and a fence, and for a long time, viz. from the 1st of March 1839 to the 14th of February 1845, with force, kept and continued said buildings and fence upon said close, against the plaintiff's will, and passed and repassed upon and over said close with cattle, &c. The trial was in the court of common pleas, before *Merrick*, J.

The defendant, before pleading, moved that the writ might be dismissed, on the ground that there was not such a description of the *locus in quo*, in the declaration, as is required by *St.* 1839, *c.* 151. This motion was overruled. The defendant then pleaded the general issue, and filed a specification of defence.

The plaintiff gave in evidence a mortgage deed, dated December 6th 1828, and duly recorded, from Jonathan Whitman to Samuel Hilton, of a tract of land in Westminster, bounded by land of James Puffer and other persons named, "together with the buildings on the same; excepting from the above tract of land so much thereof as has been set off to Rebecca Whitman, as her dower, and also excepting the mills and water privileges now owned by me; intending hereby to convey all the land and buildings owned by me in the northerly part of Westminster aforesaid, excepting the mills and water privileges aforesaid." And it was admitted that the *locus in quo* was included within the land described in said mortgage deed, unless it was excluded by the last exception.

The plaintiff then gave in evidence a deed dated May 8th 1830, executed by the administrator of said Jonathan Whitman, conveying to the plaintiff the interest which said Jonathan had, at the time of his death, in all the land and buildings mentioned in the aforesaid mortgage deed to Samuel Hilton: Also a quitclaim deed, dated June 5th 1830, given

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by said Hilton to the plaintiff, releasing the premises mortgaged by said Jonathan Whitman to said Hilton, by the aforesaid deed of December 6th 1828.

The defendant then introduced a deed, dated March 14th 1829, from said Jonathan Whitman to Samuel Mossman, conveying "one undivided half of the saw mill, northerly of said Mossman's house, and adjoining the grist mill of Aaron Cowles, with all the privileges and appurtenances thereunto belonging, as to water privilege and land for mill yard," &c.: Also a mortgage deed, dated March 26th 1829, from said Whitman to Anna Mossman, conveying the other half of said saw mill. And it was admitted that this mortgage had been foreclosed by said Anna. The defendant also introduced a deed, dated June 6th 1837, from said Anna to Asaph Mossman, releasing to him one half of said saw mill; also a deed, dated February 14th 1843, from said Asaph to Samuel Mossman, releasing to him one half of said saw mill; also a deed, dated December 6th 1844, from said Samuel to the defendant and three others, releasing to them "a certain saw mill, adjoining the chair shop of Franklin Lombard," (the defendant,) "situated in the northerly part of said Westminster, with all the privileges thereunto belonging, as to water privileges and land for a mill yard," &c.; and also a deed, dated February 14th 1829, from said Jonathan Whitman to P. & A. Cowell, conveying to them "the grist mill and chair shop, and all other buildings belonging to the same." And it was admitted that the defendant had the same title to the grist mill and chair shop, and to the mill yard adjoining them, which P. & A. Cowell had by virtue of the aforesaid deed from Jonathan Whitman to them.

It appeared, on the trial, that the mills aforesaid, the dam and pond, together with about one acre of land for a mill yard, were within the limits of the boundaries described in the aforesaid mortgage deed from Jonathan Whitman to Samuel Hilton; that said mill yard was situated southerly from said mills, and included all the land between them and the road, and had been used as such ever since the mills were

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built; and that said mill yard had been open and common, for the purpose of putting timber there, drawing the same to and fro, and passing and repassing to and from said mills, as is usual.

The plaintiff introduced evidence tending to show that he had frequently stuck up boards upon the easterly side, on said mill yard, and had passed over and through the yard, as other persons did; and that it was common for those who had lumber sawed at the mill to stick it up in the yard.

It was also proved or admitted, that before the defendant purchased the mills, to wit, ten or fifteen years before the trial, some of those who then owned the mills, converted a barn, which adjoined the chair shop, into a dwelling-house, dug a well within the limits of the mill yard, and afterwards erected a barn and dry shop within the yard. And the plaintiff offered to prove, and produced evidence to prove, that the defendant, in 1843 or 1844, rebuilt a fence, and made a yard for cattle, within the mill yard, and planted vines therein, and raised garden vegetables in said back yard; also, that the defendant, in 1843, erected a privy, in connexion with said dwelling-house, within the limits of the mill yard; and that he, for the several last years since he purchased the mills, and up to the commencement of this action, had occupied said dwelling-house, and used the mill yard in going to and from said dwelling-house, barn, &c. and had yarded a cow there, all within the limits of the mill yard.

The judge ruled, that if the jury should find the facts to be such as the evidence introduced by the plaintiff tended to prove, then the plaintiff had sufficient title and possession of the *locus in quo* to maintain trespass; and that some of the defendant's acts, if the evidence was believed, constituted a trespass, for which this action might be maintained. The defendant thereupon submitted to a verdict for the plaintiff and alleged exceptions to the several rulings of the judge.

This case was argued at September term 1846.

G. Parker & Gale, for the plaintiff.

N. Wood & G. H. Whitney, for the defendant.

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WILDE, J. Previously to the trial of this case, and before pleading, the defendant moved to dismiss the writ, on the ground that the *locus in quo* was not described with sufficient certainty, in compliance with *St.* 1839, *c.* 151, § 3, which provides, that "in actions of trespass *quare clausum fregit*, the close or place of the alleged trespass shall be designated, in the writ and declaration, by name or abuttals, or other proper description." This objection was overruled, and we think rightly. The close, in which the trespasses were alleged to have been committed, was described in the declaration as abutting on two sides by highways, on another side by a river, and on the remaining side by another lot of land. This description, in an action of trespass, is sufficiently certain, although, for obvious reasons, in a writ of entry brought for the purpose of settling a disputed line, the demanded premises must be described by reference to known and visible monuments, and not by a general reference to the line of dispute. But the reasons, on which this rule of pleading is founded, do not apply to an action of trespass, by which the title to the *locus* cannot be definitely settled, and in which damages only can be recovered.

The general question on the merits is, whether the evidence reported, if believed by the jury, would have authorized them to find that the plaintiff had such a title and possession of the *locus* as would be sufficient to maintain this action.

The plaintiff's title is derived from Jonathan Whitman, from whom the defendant also claims title; and the question of title depends on the construction of the exception in the deed from the said Whitman to Samuel Hilton, who conveyed his title to the plaintiff. It is admitted that the deeds from Whitman to Hilton, and from Hilton to the plaintiff, include the *locus*, unless it is excluded by the exception. By the deed from Whitman to Hilton the mills and water privileges, which are now owned by the defendant, were excepted, and did not pass by the grant; and the question is, whether the mill yard also was included in the exception.

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We think the rule of construction is well established, that, by the grant of a mill, the land under the mill and adjacent thereto, so far as necessary to its use, and commonly used with it, will pass by implication. *Blake* v. *Clark*, 6 Greenl. 436. And the same rule of construction applies to an exception in a grant. But to justify such an implication, it should be made to appear that the land adjacent was necessary for the use of the mill; and this was not proved at the trial. On the contrary, it was proved and admitted that the land, claimed by the defendant as a mill yard, has been used for purposes disconnected with the mills. A dwelling-house and barn have been erected thereon, and part thereof has been used as a barn yard, and for raising garden vegetables. And this action is brought for erecting three other small buildings within the limits of the mill yard, so called, and continuing the same from the year 1839 to the day of the date of the writ. These facts are conclusive against the defendant's claim that the parts of the land thus used and occupied were necessary for the use of the mills. They cannot, therefore, pass as incident to a grant of the mills, or as parcel thereof. The land claimed was not fenced, nor was the mill yard designated by any known bounds. Nothing more, therefore, can be included within the exception in the deed from Whitman to Hilton, than was necessary for the use of the mills.

We therefore consider the plaintiff's title to the *locus in quo* as valid, and that he had such a possession as would enable him to maintain trespass. The plaintiff and defendant had a mixed possession, as appears by the evidence, so that the defendant has acquired no title by disseizin.

Exceptions overruled.

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Commonwealth *vs.* William King.

An indictment, which alleges that the defendant placed and continued a large quantity of stones on a part of a highway, and thereby narrowed and obstructed it, is not within § 61 of *c.* 24 of the Rev. Sts., which provides for the removal of a fence erected on a highway, and cannot be maintained on that section, although the proof be that the stones mentioned in the indictment were a wall, made by the defendant, within the limits of the highway.

It is an indictable offence at common law to place and continue, within the established limits of a highway, a wall, or stones, or any thing which obstructs the full enjoyment, by the public, of an easement coëxtensive with those limits, although such wall, stones, or other thing, be not placed and continued within that part of the highway which can be safely used for travel.

The common law, as to nuisances in a highway, is not repealed nor altered by the Rev. Sts. *c.* 24, § 61.

The indictment, in this case, alleged that there was a common and public highway in the town of Sutton, called the Old Central Turnpike, and that the defendant, on the 1st of August 1846, "did unlawfully and injuriously put, place, lay and continue a large quantity of stones, in and upon a part of said highway, to wit, upon a space thereof ten rods long and one rod wide, and the said stones, so placed as aforesaid, he the said Wm. King, from said first day of August, until the finding of this bill, unlawfully and injuriously did keep, continue and maintain, in and upon said highway, whereby the same has been, during all the time aforesaid, and still is, greatly narrowed, obstructed and stopped up," &c. "against the peace," &c. "and contrary to the form of the statute in such case made and provided."

It was admitted, at the trial in the court of common pleas, before *Merrick*, J. that the Central Turnpike Corporation, established by *St.* 1824, *c.* 13, was duly organized, and laid out its road four rods wide, and made it of lawful width for travel; that in the year 1837, said corporation surrendered its corporate rights, and that the county commissioners laid out the same road, and of the same width, as a common highway, conformably to the provisions of the Rev. Sts. *c.* 39.

It was also admitted by the defendant, that he, in October 1846, erected about six rods of stone wall, a little less than a

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rod within the lines of said highway, and between the travelled way and his land, for the purpose of enclosing that part of the highway, around which said wall extended, with his land, and as a part of it.

The defendant then offered to introduce evidence tending to prove that the part of said highway, where said wall was erected, and the space between said wall and the exterior line of that side of said highway, had never been wrought nor prepared for travel, either by said turnpike corporation or by any persons; that the same had never been used for travel, and could not be travelled over, by reason of the ledges, rocks and stones, in the place where said wall was erected, and in said space; that there was, after the said wall was erected, as ample and convenient room for all travel on said highway, as there was before; and that said wall did not, in any degree, obstruct or hinder the travel on said highway. But the court ruled, that such evidence, if admitted, would not constitute a good defence to the indictment, and refused to admit it. The jury found the defendant guilty, and he filed exceptions to the ruling of the court.

Newton, for the defendant. The case of *Howard* v. *North Bridgewater*, 16 Pick. 189, shows that the town of Sutton could neither be liable to an indictment for the alleged obstruction in this highway, nor to an action by a traveller who should receive an injury by reason of it. It would seem to follow, that the defendant is not liable to indictment. But if he be liable, this indictment is not rightly framed. The Rev. Sts. c. 24, § 61, provide, that where buildings or *fences* have been erected on any highway, "the same may, upon the presentment of a grand jury, be removed as a nuisance." The indictment should have been on this statute provision. The fence might then have been removed; not the "stones," as the fence is called in the indictment. See Com. Dig. Chimin, C. 7. The offence proved in this case is not an offence at common law. Nothing short of an allegation and proof that a building or a fence is on a highway, or that the travel thereon is obstructed, will support an indictment. In this case, the

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travel was not obstructed; and if any indictable offence is shown, it is not the offence charged. See *Commonwealth* v. *Wilkinson*, 16 Pick. 175. *Commonwealth* v. *Chapin*, 5 Pick. 199. *Commonwealth* v. *Howes*, 15 Pick. 231.

The Rev. Sts. c. 24, §§ 61, 63, may be considered as declaring, either that the obstruction of a highway was not an offence by our common law, or that, if it was, it shall be punished only under those statutes.

Wilkinson, (District Attorney,) for the Commonwealth. English highways exist by usage, and only the travelled part is a highway. But in this Commonwealth, highways are, by statute, of a certain established width, and the narrowing of them is an indictable offence. This case is not distinguishable from that of *Commonwealth* v. *Wilkinson*, 16 Pick. 175.

The Rev. Sts. c. 24, §§ 61, 63, suppose that an indictment will lie for obstructing or narrowing a road, by placing obstructions on that part of it which is not travelled.

This indictment is good at the common law, (which is not repealed,) and the allegation, that the defendant's acts are contrary to the statute does not vitiate it, even if it be not within the statute. *Commonwealth* v. *Hoxey*, 16 Mass. 385. But the facts of the case show that the defendant is punishable under the statute.

Dewey, J. This indictment is so framed that it may be sustained, if the facts charged would authorize a conviction either under the statutes of the Commonwealth, or by force of the common law.

1. Do the facts stated in the indictment bring the case within the provisions of the Rev. Sts. c. 24, § 61? that being the only statute that is supposed to be applicable to the case. The cases embraced within this statute enactment are cases of nuisances, by reason of fences or buildings placed within the limits of the road or highway. Whether the evidence, that was offered in the present case, would have supported a count charging the offence as that of erecting a fence within the limits of a highway, it is unnecessary to consider; as no such offence is set forth in the present indictment. Such

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being the state of the case, if the evidence would have supported a charge of a nuisance in erecting a fence upon a highway, nevertheless the indictment could not be sustained for the statute offence.

2. The next inquiry is, whether the facts alleged constitute an offence at common law. Upon this point we have no doubt. By the location of a public highway, with certain defined exterior limits, the public acquire an easement coëxtensive with the limits of such highway. Whoever obstructs the full enjoyment of that easement, by making deposits, within such limits of the located highway, of timber, stones or other things, to remain there and occupy a portion of such public highway, is guilty of a nuisance at common law.

It was contended by the counsel for the defendant, that the rights of the public are confined exclusively to the made or travelled road, or to that part which might be safely and properly used for travelling; and that a deposit of timber, stones or other articles, upon a part of the located highway, which, from its want of adaptation to use for travel, could not be thus enjoyed, — as a portion of the way on which there was a high bank, or a deep ravine, — would not subject the party to an indictment for a nuisance upon the highway. This principle is supposed to be sanctioned by the decisions of this court in reference to the rights of travellers, holding that such travellers are to use the travelled or made road, and that if such road is of suitable width, and kept in proper repair, the town may have fully discharged its duty, although it has not made and kept in repair a road of the entire width of the located highway. But there is a manifest distinction between the two cases. In the case supposed, the traveller has all the benefits of a public way secured to him. He only requires a road of proper width, and kept in good repair. But the town, on the other hand, to enable itself to discharge its obligation to the public, requires the full and entire use of the whole located highway. The space between the made road and the exterior limits of the located highway may be required for various purposes; as for making and keeping in

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repair the travelled path; for making sluices and water-courses; for furnishing earth to raise the road. And, not unfrequently, from the location of the road and from its exposure to be obstructed by snow, the entire width of the located road is required to be kept open, to guard against accumulations of snow that might otherwise wholly obstruct the public travel at such seasons. For these and other uses, in aid of what is the leading object, the keeping in good repair of the made or travelled road, the general easement in the public, acquired by the location of a highway, is coëxtensive with the exterior limits of the located highway; and the question of nuisance or no nuisance does not depend upon the fact, whether that part of the highway, which is alleged to have been unlawfully entered upon and obstructed by the defendant, was a portion of the highway capable of being used by the traveller. Whether it be so or not, an entry upon the located highway, and occupation of any portion of it by deposits of lumber, stones, &c. would be a nuisance, and subject the party to an indictment therefor.

We do not perceive any new principle to be settled in the decision of this case. It is only the frequently occurring case of an indictment for a nuisance upon a highway. Such indictment, charging acts of similar character to the present, have always been sustained as good at common law. And when an offence, punishable at common law only, is alleged to be contrary to a statute, this allegation may be rejected as surplusage. 1 Chit. Crim. Law, 289. 16 Mass. 385.

It was suggested in the argument, that as the legislature has undertaken to legislate upon the subject of nuisances upon the highways, the inference must be, that, by the enactment of the Rev. Sts. c. 24, § 61, it was virtually declared, either that no such offence existed at common law, or if such was not the effect, still, having enacted a statute applicable to the subject, the offence was no longer punishable at common law. The first position we think unsound; and as to the other, we consider the provisions of the statute to be merely cumulative, leaving the common law in full force as to cases like the present.

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The court are of opinion that this offence is properly punishable as an offence at common law, and that the ruling of the court of common pleas, upon the trial, was correct.

Exceptions overruled.

COMMONWEALTH *vs.* BENJAMIN W. ABBOTT & another.

A person called as a juror, on the trial of an indictment, who, upon examination on oath, according to the provision of the Rev. Sts. *c.* 95, § 27, answers that he has formed and expressed an opinion that the statute, on which the defendant is indicted, is in force, and was constitutionally enacted, is not thereby shown not to stand indifferent in the cause: And after he has made such answer, the court will not allow him to be asked whether he can give due weight to, and be fairly influenced by, the arguments of the defendant's counsel against the opinion so formed and expressed.

THE defendants were indicted, in several counts, for selling spiritous liquor, contrary to the provisions of the Rev. Sts. *c.* 47, §§ 1, 2, 3. When they were set to the bar to be tried, in the court of common pleas, before *Merrick*, J. their counsel requested the court to put the following questions to the first juror who was called: "Have you formed or expressed any opinion, or are you sensible of any bias or prejudice upon the questions of law involved in this indictment, or the law on which it is founded, or upon the questions whether so much of the 47th chapter of the revised statutes, as was repealed by *St.* 1838, *c.* 157, and §§ 1, 2, 3 of said 47th chapter, are valid and in force, and the enactments, contained in said sections, constitutional, or not?" These questions were propounded, by the court, to the juror, who answered, that he had formed and expressed the opinion that the said first three sections of the said chapter were valid and in force; that so much of the said chapter as was repealed by *St.* 1838, *c.* 157, was revived by the enactment of *St.* 1840, *c.* 1; and that the provisions of said first three sections of the said chapter 47 of the revised statutes were constitutionally enacted. The defendants' counsel thereupon objected, that said juror was

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disqualified to act as a juror, as he had formed and expressed an opinion upon one of the essential elements of the issue to be tried upon said indictment. But the court, being of opinion that it did not appear, from the juror's answers, that he did not stand indifferent, overruled the objection, and ordered him to be sworn. The defendants' counsel then requested the court to ask the said juror, "whether, having formed an opinion, and having a bias on his mind, that the first three sections of c. 47 of the Rev. Sts. are in force, and that so much of the said chapter as was repealed by *St.* 1838, *c.* 157, was revived by *St.* 1840, *c.* 1, and that the provisions of said three sections were constitutionally enacted, he could hear, appreciate, and give due weight to, and be fairly influenced by, the arguments of the defendants' counsel, that said three sections are not in force, and were not revived by *St.* 1840, *c.* 1, and that the provisions therein were not constitutional." But the court declined to permit the question to be put; and the juror was then sworn. A jury was empannelled, and a verdict was found against the defendants, who alleged exceptions to the rulings and decisions of the court.

Bridges, for the defendants.

Wilkinson, (District Attorney,) for the Commonwealth.

Shaw, C. J. The question presented by the present case is, whether a juror can be held to be under such bias or prejudice as to be disqualified from serving as juror, by reason of his answering that he had formed and expressed an opinion that certain provisions in the revised statutes, though once repealed, had been revived, and were in force as laws, and were not unconstitutional.

The first remark applicable to the case is, that if, as the argument assumes, jurors were fully charged with the duty, and invested with the authority, of deciding questions of law finally, according to their own judgment, it would be very strange if a juror should be held disqualified in consequence of entertaining opinions on abstract questions of law, which have repeatedly been declared correct by this court, and by

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various judges of the court of common pleas, as we know judicially, from authentic documents.

Again; if jurors are to decide on questions of law, the argument in support of these exceptions goes on the assumption that they are bound to form their opinions anew in each particular case, upon the arguments of counsel in that case, aided perhaps by the court; and that study, reflection, and previous discussion, upon which they may have acquired an exact knowledge of the law, would render them unfit persons to declare and apply it to the particular case. If this were an objection to a juror, standing in the place and acting in the capacity of a judge, in matters of law, it must be an equally valid objection to a judge; and it would follow, as a legitimate consequence, that the devoted study, long practice, extensive and varied experience at the bar and on the bench, which may have enabled a judge to form clear, matured and settled opinions upon great questions of constitutional and municipal law, and which, by his readiness for the application of them to practice, have been hitherto supposed to be among the high qualifications of a judge, would render him partial and unfit for the performance of judicial functions. If this were true in criminal cases, it is not perceived why it should not be true in civil cases. It is sufficient barely to state the absurd consequences to which such a proposition would lead, in order to show that it is wholly untenable.

Without stopping to inquire how far any questions, of the kind which were put to the juror, are admissible, nothing appears in the answers of the juror to show that he did not stand indifferent, or that he was disqualified for serving as a juror.

The argument, urged upon the court of common pleas, to reject the juror, was, that it appeared by his answers that he had formed an opinion upon one or more of the essential elements of the issue to be tried. But this, we think, is a fallacy. These elements are not essential to the just decision of any question which the jury are called upon to decide, or in regard to which, the formation of an opinion, upon an abstract

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question of law, would render them other than indifferent, within the meaning of the law. *Pettis* v. *Warren*, Kirby, 427. Whether any provision of a statute is in force, its true construction, and the constitutional power of the legislature to make it, are pure abstract questions of law, upon which it is the privilege and the duty of the juror to be governed definitively by the instructions of the judge before whom the indictment is tried. If they coincide with his own opinions, of course he is not disqualified; and if they differ from his, it is his duty to yield his own and follow those of the judge; and having taken upon himself the duty of a juror, and taken an oath faithfully to perform it, the law presumes that he will do it. Whether, if the juror should express a determination not to follow the instructions of the court, in matters of law, if they should differ from his own opinion, this would show him partial and disqualified, like a declaration made beforehand that he would not be governed by evidence, in matters of fact, if it should tend to a result contrary to his own preconceived views, is a grave question, which may better remain until it is judicially raised.

The obvious purpose of the statute (Rev. Sts. *c.* 95, § 27) is, to ascertain whether the juror has formed any opinion upon the merits, so that he cannot act and decide impartially upon the trial of the particular cause, so far as, by the law, it depends on the exercise of his judgment. But upon questions of pure law, that part of the issue is not open to the exercise of the judgment of jurors, any further than this, namely, to exercise their best judgment in understanding the principles of law applicable to the case, as stated, qualified, and expressed by the court, and in applying them to the facts which are fully open to the exercise of their best judgment. And their duty is done by giving such a verdict as, upon the law thus stated, and the facts to be found by them, on the evidence applied by them according to the law, the law requires *Commonwealth* v. *Porter*, 10 Met. 263.

If it be asked, where then is the propriety of arguing questions of law to the jury, the just answer is, that, correctly

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speaking, questions of law, as such, are not argued to the jury. The mode of conducting a trial before the court and jury arises from necessity and convenience, from the obvious practical difficulty of adopting any other mode. The whole trial, embracing law and fact, and resulting in a general verdict, is necessarily conducted before the court and jury conjointly; and the law must be stated and explained by the counsel, first, for the consideration and decision of the court, and secondly, to enable the jury to apply the law to the facts they may find, which they must do, in order to return a general verdict. But this course of counsel, in arguing questions of law before the court and jury at once, under the general direction of the court, no more implies that the jury may rightfully pass their judgment upon the questions of law, contrary to the instructions of the court, than it does that the court may rightfully pass a definitive judgment upon the questions of fact, upon the weight of evidence and the credit due to witnesses, against the judgment and conviction of the jury, which they clearly cannot.

Another question on these exceptions is, whether the court were bound to put a question to the juror, to this effect; viz. having formed an opinion upon the existence and constitutionality of certain sections of the law, whether he could hear, appreciate, and give due weight to, and be fairly influenced by, the arguments of the defendants' counsel, to convince him that such sections are not in force, or, if they are in force, that they are not constitutional. For the reasons already given, we think the question was wholly immaterial, and one which the counsel had no right to put to a juror; and that the answer, whichever way it might be given, would not affect the question of his standing indifferent; and therefore that the court rightly declined to propound it.

Exceptions overruled.

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Healey Baker *vs.* Lovell Baker, Jr.

In an action of trespass for taking and carrying away goods, the omission to state the value of the goods, in the declaration, is matter of form only, and is cured by pleading in chief as well as by verdict, and is not a ground of exception to the admission of evidence to prove the value.

Trespass for taking and carrying away goods. At the trial in the court of common pleas, before *Washburn*, J. the plaintiff offered evidence of the value of the goods alleged, in the declaration, to have been taken by the defendant. To the admission of this evidence the defendant objected, because there was no averment in the declaration that the goods were of any value. But the judge admitted the evidence, and instructed the jury that they should assess damages to the value of the goods, as proved by the evidence. The jury returned a verdict for the plaintiff for $16·21; and the defendant alleged exceptions.

G. Parker, for the defendant. In trespass *de bonis asportatis*, the declaration must aver some value of the goods. 1 Chit. Pl. (6th Amer. ed.) 410. Gould Pl. 187. *Anon.* 2 Show. 147. Bac. Ab. Trespass, I. 2, cites *Usher* v. *Bushell*, 1 Sid. 39, and *Strode* v. *Hunt*, 2 Lev. 230. If no value is averred, none can be proved; for the *probata* must be conformable to the *allegata*. *Hope* v. *Commonwealth*, 9 Met. 134. If the evidence was admissible, the verdict has doubtless cured the defect.

E. Clarke, for the plaintiff. The omission to allege the value of the goods, in the declaration, is matter of form only, and is cured by the verdict. *Usher* v. *Bushell*, 1 Sid. 39. *Hawkins* v. *Johnson*, 3 Blackf. 46. 2 Johns. 421, *note*. In Steph. Pl. (1st ed.) 318, it is said that, with respect to value, it is not necessary that the proof should correspond with the averment; and in Gould Pl. 187, it is said, that as the plaintiff is not obliged to state the true value, the rule requiring it to be stated at all is of no great practical use.

The omission is matter of special demurrer only; and since

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such demurrer is abolished by *St.* 1836, *c.* 273, § 3, matters of mere form cannot be permitted to defeat a plaintiff's action. See *Slack* v. *Lyon*, 9 Pick. 64.

Shaw, C. J. In trespass *de bonis asportatis*, an averment of the value of the articles carried away is not a material averment. The omission of it is a defect of form, which can be taken advantage of by special demurrer only. The defect is cured by pleading in chief and by the verdict. Com. Dig. Pleader, 3 M. 1, 8. *Newcomb* v. *Ramer*, 2 Johns. 421, *note*. *Usher* v. *Bushell*, 1 Sid. 39.

The case of *Hope* v. *Commonwealth*, 9 Met. 134, which was an indictment for larceny, where the value is material both to the jurisdiction and the judgment, bears no analogy to the present case. Proceedings in criminal cases are governed by different rules.

The defect of form in the declaration afforded no ground of exception to the admission of the evidence.

Exceptions overruled.

Charles Blair & another, Appellants.

By the Rev. Sts. *c.* 65, §§ 11, 14, the sale, by an administrator, of real estate mortgaged to his intestate, and of the debt secured by the mortgage, is required to be by license of the probate court, obtained in the manner required, by Rev. Sts. *c.* 71, although neither the intestate nor the administrator has taken possession of the estate.

Shaw, C. J. This was a petition to the judge of probate, by the administrators of the estate of Cyrus Stockwell, for leave to sell a note and mortgage of real estate, payable to their intestate, and not yet due; no possession having been taken of the mortgaged estate, by the intestate or by the petitioners. The petition states that the note and mortgage were given to the intestate on the 1st of October 1844; that the note was for the sum of $3550, payable in six years from date, with interest semiannually; that the condition of the mortgage was that the mortgagor should pay said note, and the interest

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thereon, according to its tenor; should keep the mortgaged premises insured and in repair; and pay the interest on prior mortgages thereon, amounting to about $12,000; that the estate of said Stockwell, their intestate, had been duly represented by them to be insolvent; that commissioners of insolvency had been duly appointed; that the available assets in the petitioners' hands amount to about $2000, and the debts against the estate to about $5000; that the charges of administration will probably amount to $500; and that said estate would be prejudiced by waiting for the payment of said note and mortgage, at the maturity of the note in October 1850.

The judge of probate declined to grant the prayer of the petition, on the ground that it was not necessary to grant it in order to enable the administrators to sell and assign the said note and mortgage. And he passed a decree dismissing the petition. From that decree they have appealed to this court.

On referring to the Rev. Sts. c. 65, §§ 11, 14, we are of opinion that the court of probate has authority to grant a license in such cases, and that the petition presents a fit case for the exercise of it. Section 11 declares, that "when any mortgagee of real estate, or any assignee of such mortgagee, shall die, without having foreclosed the right of redemption, the mortgaged premises, and the debt secured thereby, shall be considered as personal assets in the hands of his executor or administrator, and shall be administered and accounted for as such," and directs the mode in which they shall take possession. Section 14 provides, that "any real estate, so held by an executor or administrator in mortgage, may be sold, (subject to the right of redemption, if not foreclosed,) for the payment of debts or legacies, and the charges of administration;" "such sale to be made by the executor or administrator, upon obtaining a license therefor, in the manner provided in the seventy first chapter," which gives power to the court of probate. We are of opinion that the present case is within the provisions of these sections.

It may be probable that the legislature, by the terms of § 14, "real estate so held by an executor or administrator,

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had more immediate reference to mortgaged estate on which the executor or administrator had entered *in pais*, or by a judgment. But the terms are broad enough to cover all estate mortgaged to the testator. The right to enter, and the right to maintain a real action, given by § 11, imply that the executor or administrator has a qualified seizin, and holds the estate. And the reason of the provision for a license to sell applies as strongly to estate of which the administrator has not obtained possession, as to that on which he has entered.

The decree of the judge of probate is reversed. And it appearing to us that a license is necessary, by law, to enable the administrator to sell the said mortgaged estate, and the note secured thereby, the case is to be remanded to the probate court, for further proceedings on said petition.

J. C. B. Davis, for the petitioners.

SAMUEL HOUGHTON *vs.* DANIEL MANN.

M. made a note payable to his own order, and at the same time indorsed it in blank, and delivered it to G. for G.'s own use: M.'s signature to the note, and his indorsement and delivery thereof to G., were in the presence of an attesting witness: G. afterwards transferred the note to H. by delivery, under the blank indorsement: More than six years after the note was payable, H. brought an action thereon against M. *Held*, that the action was barred by the statute of limitations, not being within the Rev. Sts. *c.* 120, § 4, which except from the statute bar "any action brought upon a promissory note which is signed in the presence of an attesting witness, provided the action be brought by the original payee, or by his executor or administrator."

ASSUMPSIT on the money counts, to recover the contents of this note: "Boston, January 11th 1836. For value received, we jointly and severally promise to pay to the order of Daniel Mann six thousand three hundred and eighty dollars and twenty five cents in one year from the 22d day of August next, with interest annually from the 22d of August last.

Daniel Mann, Principal.

Attest: Samuel Kendall, Surety.

J. Willard to D. Mann.

T. Peckham, jr. to D. M. and S. K."

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The case was submitted to the court, on the following agreed statement: "Said note is indorsed by the said Daniel Mann, by his writing his name across the back thereof, which is attested as follows, viz. 'Witness, J. Willard.' The plaintiff is the holder of said note, and the writ is dated May 12th 1846. The defendant relies upon the statute of limitations.

"Said J. Willard, the attesting witness, saw the defendant sign said note and write his name upon the back thereof; and said witness, at the same time, attested both said signatures in the defendant's presence. The defendant can prove, by said witness, if it be competent evidence and legally admissible, that said note was not originally indorsed to the plaintiff, but to one Rufus K. Goodnow, by whom it was passed to the plaintiff; but the plaintiff contends that such parol testimony is not legally admissible.

"If the plaintiff is entitled to recover, upon the foregoing statement of facts, the defendant is to be defaulted; otherwise, a nonsuit is to be entered."

N. Wood, for the plaintiff. The note was not a contract till it was indorsed. *Pitcher* v. *Barrows*, 17 Pick. 361. *Hazlehurst* v. *Pope*, 2 Stew. & Port. 259. The original parties to the note, therefore, are the indorser and the indorsee. *Little* v. *Rogers*, 1 Met. 108. *Kinsman* v. *Wright*, 4 Met. 219.

The last indorsee may strike out the previous ones, and make the note payable to himself. *Lovell* v. *Evertson*, 11 Johns. 52. *Thompson* v. *Robertson*, 4 Johns. 27. So the holder may fill up a blank indorsement, by making the note payable to himself. The indorser, who signs his name in blank, may give parol authority to any one to fill up the blank, and make whom he pleases the payee. See *Warring* v. *Williams*, 8 Pick. 322.

Parol evidence is clearly inadmissible for the purpose of showing the legal result of a contract.

There are suggestions of the court, in *Kinsman* v. *Wright*, before cited, which go far beyond the decision there made. The decision was made on the ground that the indorsement was not attested.

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E. Fuller, for the defendant, relied on the case of *Kinsman* v. *Wright*, 4 Met. 219.

Shaw, C. J. The facts, as they stand in the agreed statement, leave it doubtful whether the blank indorsement was originally filled up. But it was agreed, at the argument, that, at the time of the original transaction, (if the fact is open to proof,) the signing of the note and the indorsement were both attested by the witness at the same time; that the note was delivered, in the presence of the witness, to Goodnow, for his own use; and that it was afterwards by him transferred still under the blank indorsement, to the present plaintiff.

In answer to a defence on the statute of limitations, the only question is, whether this case comes within the exception of the Rev. Sts. c. 120, § 4. This section excepts from the statute an "action upon a promissory note, which is signed in the presence of an attesting witness, provided the action be brought by the original payee, or by his executor or administrator."

The first consideration is, that upon the face of the note the plaintiff is not the original payee. On the contrary, the defendant was the payee, and the plaintiff the indorsee. The policy of the statute, in limiting the exception to actions brought by the original payee, probably was, that the original consideration of the note, and the circumstances under which it was given, would be open to inquiry, and the attesting witness would, in general, be a witness to prove them. But in an action on a promissory note, payable on time, brought by an indorsee, all these inquiries, admissible only between the original parties, would be precluded. In *Kinsman* v. *Wright*, 4 Met. 219, the suit was on a note payable by the promisor to his own order. In such a note, there is no contract, until it is indorsed; and the first person to whom it is negotiated is the original party with whom the contract is made. If, on such a contract, any one can be considered the payee, it is the person to whom it is first made payable by contract. But in *Kinsman* v. *Wright* it was held that the action would not lie, because the indorsement was not attested. And the

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present case is quite as strong; for although the name of the defendant does appear on the note, it is not as promisor, but as payee. See *Russell* v. *Swan*, 16 Mass. 314.

According to usage and the custom of merchants, a blank indorsement by the payee would authorize the holder to write over the indorsement words making it payable to himself or any other person; and such indorsement must be filled up before it can be read in evidence as proof. The indorsement, thus filled up, would transfer the payee's interest in the note to the indorsee, and render the indorser conditionally liable as indorser, but nothing more. The attestation of the indorsement does not add to the force and effect of the indorser's contract, but only authenticates the execution of the indorsement.

If the plaintiff would go further, and rebut the presumption arising from the note itself, and claim that he had an authority to insert words over the defendant's indorsement, which would, in effect, make a new note, payable to the plaintiff as original payee, — which he must do, in order to bring his case within the exception, — he must prove such an express authority; none being implied. To do this, he must rely upon the attesting witness; and it is conceded that, instead of this, he would testify that the note was indorsed in blank, and delivered to Goodnow, as indorsee, for his own use. We think the action is barred by the statute of limitations, and is not within the exception. *Plaintiff nonsuit.*

LEANDER LACKEY *vs.* STEPHEN M. HOLBROOK & another.

On the trial of an action of trover against H. & E., the jury disagreed as to H., but found a verdict in favor of E., on which judgment was rendered. *Held*, on a second trial of H., that E. was a competent witness for him.

TROVER for certain tools and implements of trade, which were alleged to be by law exempted from attachment, but which were attached by Edwin Eaton, a deputy sheriff, one

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of the defendants, on a writ against the plaintiff, in favor of Stephen M. Holbrook, the other defendant.

At the new trial granted by this court, (11 Met. 458,) and had in the court of common pleas, December term 1846, the jury found a verdict declaring the defendant Eaton not guilty, but did not agree as to Holbrook. Judgment was rendered for Eaton, on said verdict.

At March term of the same court, in 1847, another trial was had before *Washburn*, J. when said Eaton was offered as a witness for Holbrook. The plaintiff objected to the competency of the witness, because he was a party to the record in the case. But the judge overruled the objection, and the witness was sworn and testified; and a verdict was returned for Holbrook. The plaintiff alleged exceptions to the admission of the witness.

No argument was had in this case.

Shaw, C. J. In tort, where defendants are liable jointly and severally, when one is acquitted, and especially if judgment has been entered on the verdict of acquittal, he may be examined as a witness for the other defendant, if he is not otherwise incompetent. He is no longer a party to the issue. 1 Greenl. on Ev. § 357. Tait on Ev. 369.

Exceptions overruled.

Stephen M. Holbrook *vs.* Leander Lackey.

In a suit by a surviving partner, to recover a debt due to the firm, the defendant may set off a debt due to him from the surviving partner alone.

Assumpsit, by the surviving partner of the firm of Holbrook & Houghton, on a note for $349·50, given by the defendant to said firm, dated March 4th 1844, payable in four months. The defendant filed an account, in set-off, of one hundred and fifty dollars, "cash paid to Stephen M. Holbrook," (the plaintiff,) in February 1845, and offered evidence, at the trial in the court of common pleas, before *Washburn*, J. to show

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that he lent that sum to the plaintiff. But the judge ruled, that money lent by the defendant to the plaintiff could not be set off against a claim in favor of Holbrook & Houghton, though sued by Holbrook alone, as surviving partner. To this ruling the defendant alleged exceptions.

Stone, for the defendant. By the Rev. Sts. *c.* 96, §§ 1, 7, mutual debts or demands between the plaintiff and defendant, may be set off, in all actions founded upon demands which could themselves be the subject of set-off, according to law. The case at bar is within these provisions. *Slipper* v. *Stidstone*, 5 T. R. 493. *French* v. *Andrade*, 6 T. R. 582. *Lewis* v. *Culbertson*, 11 S. & R. 48. *Gordon* v. *Bowne*, 2 Johns. 155. Gow on Part. (1st Amer. ed.) 183, 184. Collyer on Part. (1st ed.) 436. Story on Part. § 346. *Meader* v. *Scott*, 4 Verm. 26. *Stafford* v. *Gold*, 9 Pick. 533.

J. C. B. Davis, for the plaintiff. The real question is, whether a partner can be compelled to apply the funds of the partnership to the payment of his individual debts. The Rev. Sts. *c.* 96, §§ 1, 8, 15, seem conclusively to decide this question in the negative. By § 15, in suits brought by trustees in their representative character, no demand shall be set off that is due from such trustees in their own right. The plaintiff is trustee for the creditors of the firm, and the representatives of the deceased partner. *Washburn* v. *Goodman*, 17 Pick. 519. *Dyer* v. *Clark*, 5 Met. 562. Story on Part. §§ 346 – 349.

The English cases cited for the defendant were decided under English statutes, which are different in their language from our revised statutes.

Shaw, C. J. On a suit brought by the plaintiff as surviving partner of Holbrook & Houghton, the defendant offers, by way of set-off, evidence of a subsequent loan of money made by him to the plaintiff Holbrook alone. There is nothing in the facts to show that the deceased partner, Houghton, did not die before the loan made by the defendant to Holbrook. The debt sued became due in July 1844, and the loan was made by the defendant in February 1845. But we will

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assume, for the purposes of the present inquiry, that the loan by the defendant to Holbrook was made whilst both partners were living. The general rule of the common law certainly is, that a debt due to partners is due to them jointly; and upon the death of one, the sole right survives to the other. It is true that the survivor collects partnership debts, under a liability to account; but at law he is the sole creditor, and has the sole power to collect the debt, and to maintain a suit to recover it. And all the legal consequences resulting from this principle are held to flow from it. The surviving partner, in suing, may join a separate debt of his own. *Hancock* v. *Haywood*, 3 T. R. 433. So a surviving partner, in a suit against him for a separate debt of his own, may set off a debt due to him and his deceased partner jointly. *Slipper* v. *Stidstone*, 5 T. R. 493. So a debt due from the plaintiff, as surviving partner, may be set off against a debt due from the defendant to the plaintiff severally. *French* v. *Andrade*, 6 T. R. 582. In our own courts, it has been held that a surviving partner of two firms may join demands of both in one suit. It is so far held to be his duty to do so, that he can have but one bill of cost if he brings two actions. *Stafford* v. *Gold*, 9 Pick. 533. Neither the administrator of the deceased partner, nor any creditor of the partnership, can have any suit or proceeding, in law or in equity, against the partnership debtor, unless through legal proceedings in insolvency, instituted on the application of the debtor, or of the creditors. Till then, the law makes no distinction between a debt originally due to a party severally, and a debt due to him as surviving partner. It is not the less a debt due to him in his own right, because, when collected, he may be personally liable to account for it on settlement of the partnership account, as for other payments made to him as partner.

Nor, as we think, has this rule been altered by the Rev. Sts. c. 96, § 1, providing for the set-off of mutual demands. After the death of one partner, the demand of the survivor against the debtor of the firm, and of such debtor against the surviving partner, are strictly mutual. Section 8

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provides for the case where there are several persons, either debtors or creditors. By § 4, the demand to be set off must be due to the defendant in his own right. Here it is so. This section manifestly refers to cases of executors, administrators, trustees, and all parties suing or being sued in a representative capacity.

It was strongly pressed by the plaintiff's counsel, that to allow this set-off would be to authorize the appropriation of partnership funds to pay the private debt of one of the partners, to the injury of partnership creditors. But this argument is specious, rather than sound. We are not to presume, necessarily, that there are outstanding partnership debts, or that the funds are not ample to meet them.

But how does it affect partnership creditors? If the surviving partner could recover the whole, without the deduction of the demand, which the defendant seeks to set off, he would be liable, indeed, to pay the partnership debts, if there are any. But he would be equally liable without; and in either case, these creditors must look alone to his personal liability, and would have no means of compelling him to appropriate the specific money, so recovered, to the payment of their debts.

The court are of opinion that the set-off should have been allowed.

JOHN M. NILES *vs.* JOHN S. NYE & another.

A. mortgaged one parcel of real estate to B., and another parcel to C., and A.'s wife released her right to dower in both parcels: A.'s equity of redemption was conveyed to G., who mortgaged it to N.: A. died, and J., his heir at law, took an assignment of the mortgages made to B. and C., and dower therein was set off to A.'s widow, who had released her right of dower, as if no mortgage had been made. *Held*, on a bill in equity brought by N. against J. and the widow, that the assignment of dower was not binding on N., as the widow had no right of dower, as against N., without contributing her portion towards the redemption of the first two mortgages; and that N. had a right to redeem those mortgages, on paying what was due thereon, deducting rent and profits, and to have an assignment thereof made to him.

BILL IN EQUITY. The plaintiff alleged that Crocker Nye, on the 23d of July 1822, mortgaged certain real estate to

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Elizabeth Waldo, to secure payment of $500, and on the 15th of February 1827 mortgaged certain other real estate to the Massachusetts Hospital Life Insurance Company, to secure payment of $12,000; and that Dulcena Nye, wife of said Crocker, executed both said mortgages, with him, and released her dower in the mortgaged premises: That on the 14th of November 1840, the interest of said Crocker, in all said mortgaged estate, came, by mesne conveyances, to Charles B. Green, who mortgaged the same to the plaintiff, to secure payment of $1700: That said Crocker afterwards died, leaving the defendant, John S. Nye, his son and heir at law, and the said Dulcena, the other defendant, his widow, entitled to dower in said real estate, subject to the first named two mortgages: That the Hospital Life Insurance Company, on the 18th of December 1842, took possession of a part of the premises mortgaged to them, for condition broken, and on the 9th of August 1844, the said Elizabeth Waldo took possession of a part of the premises mortgaged to her, for condition broken: That the said Life Insurance Company, on the 24th of August 1844, and the said Elizabeth Waldo, on the 26th of the same August, assigned their mortgages and debts to the defendant, John S. Nye, who, on the 21st of October 1844, took possession of the residue of the premises mortgaged to said Life Insurance Company: That the defendants, on the 3d of September 1844, combining to deprive the plaintiff of his security aforesaid, set off to said Dulcena, as her dower in said mortgaged real estate, fourteen acres, with the buildings thereon, which constituted one full third of the whole value of said estate, without making any deduction on account of said two first named mortgages; that she entered upon and retained possession of the same; and that the said John S. Nye has continued in possession of the remainder of said estate, and received the rents and profits thereof; and that, on the 20th of November 1844, the plaintiff requested him to render an account, but that he has not rendered any just account.

The *prayer* of the bill was for answers not under oath;

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that the plaintiff might be let in to redeem, upon paying what is due on said two mortgages; that an account of the rents and profits might be rendered; that the said mortgages might be assigned to him; that the assignment of dower be set aside; and for general relief.

The *answer of Dulcena Nye* admitted most of the allegations in the bill, and alleged that when she was married to said Crocker Nye, she "carried $500 to him, which he appropriated;" that, after the death of said Crocker, she demanded of said John S. that he should set off her dower; and that he and she made an agreement, dated August 31st 1844, that three men [named] should set off her dower, who did set off, among other things, fourteen acres named in the bill; but that she knew not whether they made any deduction on account of said mortgages; she denied all combination and conspiracy, and asserted that it would be inequitable to set aside said assignment of dower, or to cause the said mortgages to be assigned to the plaintiff.

The *answer of John S. Nye* also admitted the main allegations in the bill, but denied all combination, and averred that the demand and setting off of dower were as set forth in the answer of the other defendant, and that he had no knowledge whether any deduction was made on account of said two mortgages. His answer further stated, that he rendered an account, on the 23d of November 1844, upon the plaintiff's demand, and that he was ready to discharge said mortgages, on payment thereof; but he denied the right of the plaintiff to any assignment of them.

It appeared from the deposition of one of the men who set off said Dulcena's dower, that no deduction was made on account of the mortgages.

Hartshorn, for the plaintiff.

Newton, for the defendant.

Wilde, J. This is a bill in equity to redeem two mortgages, made by Crocker Nye, deceased, one to Elizabeth Waldo, and one to the Massachusetts Hospital Life Insurance Company, in both of which mortgage deeds, Dulcena Nye

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one of the defendants, and the wife of said Crocker, duly released her right of dower. These two mortgages, after the death of the mortgagor, were duly assigned to John S. Nye, the other defendant; and it is admitted that the plaintiff is the lawful owner of the equities of redemption, and has a right to redeem, by paying the mortgage debts. The defendants deny his right to the assignment of the mortgages, on the ground that the said John S. Nye has made a valid assignment of dower to the said Dulcena, at a time when, from the long delay of the plaintiff to redeem the mortgages, they had no reason to suppose that he ever intended so to do. But this delay to pay the mortgages cannot affect the plaintiff's right to redeem. Nothing but a foreclosure of the mortgages could defeat that right. So, we hold it equally clear that the assignment of dower by John S. Nye, the assignee of the mortgages, is not valid and binding on the plaintiff. The right of dower being released by the said Dulcena, she clearly has no right of dower, against the plaintiff, unless she will contribute her portion towards the redemption of the mortgages. If she declines so to do, the plaintiff has a right to redeem, on paying the two mortgages, deducting the rents and profits, and will be entitled to an assignment of the mortgages, according to the principles laid down in *Gibson* v. *Crehore*, 5 Pick. 146.

Referred to a master, to take an account.

ARTEMAS BRYANT *vs.* LUTHER CLIFFORD.

A. furnished B. with upper leather to be made into boots, under a parol agreement between them, that the leather should remain A.'s until paid for: B. made boots, and for a while sent them to New York, to be sold by a commission merchant, who made acceptances for B. alone, and made remittances to B. alone: A parcel of boots, afterwards made by B. from upper leather so furnished by A., were attached as B.'s property, and were subsequently sold as such, on execution, by the attaching officer. *Held*, that A. was either the owner of the whole property in the boots, or was owner in common with B., and might, on either ground, maintain an action of trover against the officer for a conversion by the sale on execution

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TROVER for one hundred and twenty pairs of boots, attached by the defendant, a deputy sheriff, as the property of Phinehas Brooks. At the trial in the court of common pleas, before *Washburn*, J. it was admitted that the boots were in the possession of said Brooks when they were attached, and that they were afterwards sold by the defendant, on an execution against Brooks.

The plaintiff called Brooks as a witness; and he testified that he manufactured the boots, and that the upper leather in them was furnished by the plaintiff, who was a tanner, under a parol contract that he would furnish it for boots to be made by him, (Brooks,) and that it should remain the plaintiff's until paid for; that the plaintiff never furnished him with sole leather, but had authorized him to exchange the upper leather, so furnished, for sole leather; that he had never made such exchange, but had exchanged boots, made from the plaintiff's upper leather, for sole leather, and having worked that sole leather, thus obtained, and the plaintiff's upper leather, into boots, again exchanged a portion of them for sole leather, and so did successively, for five or six times. His testimony tended to show that when boots were made by him, he sent them to a commission merchant in New York, where they were sold on his account, and that all acceptances and remittances were to him; that there was no application of particular funds to the payment of the plaintiff for leather in the specific boots from which the funds arose; that he, (Brooks,) during the time, purchased upper leather of one Clark, under a similar contract, and of others unconditionally, and that boots, made from the same, were sent by him to New York, and were sold in the same way, but were kept distinct from those made from leather furnished by the plaintiff, by means of marks understood by the witness; that the boots now in question, when attached, were in boxes, ready to be transported to New York; that they were made from upper leather furnished by the plaintiff; that they were of the value of $1·75 a pair, of which the upper leather was worth sixty cents, and the sole leather from thirty to thirty four cents.

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The witness exhibited several bills of leather furnished by the plaintiff, which were in this form: "P. Brooks bought of A. Bryant seventeen [or some other number] sides, to be his when paid for."

The defendant's counsel requested the court to instruct the jury, that if Brooks had as much right to the possession of the property as the plaintiff, then the plaintiff could not recover; and that, in order to recover, the plaintiff should have had a paramount right to possession at any time, without or against the will of Brooks. But the court instructed the jury, that the plaintiff, in order to recover, must have the right of property and the right to the immediate possession of the boots; that if the property in the stock was in the plaintiff, and if there was no agreement between him and Brooks, whereby Brooks had a right to hold possession against the plaintiff, the fact, that the leather was in Brooks's actual possession, was not a valid objection to the plaintiff's right to recover in this action, as the right of property would, in the absence of an agreement to the contrary, draw to it the right of possession.

The defendant's counsel contended, that if any part of the sole leather of the boots belonged to Brooks, the plaintiff could not recover in this action, either, *first*, because the property of Brooks and the plaintiff was so mingled as not to be distinguishable and separable, or *secondly*, because Brooks and the plaintiff were tenants in common, and the defendant was not liable by reason of having attached the boots as the property of Brooks. But the court instructed the jury, that if the contract above stated was *bona fide*, and the upper leather of the boots, under that contract, belonged to the plaintiff, and if the upper leather constituted the principal part of the boots, so that the sole leather and the work put into them were the incidents to such principal part, then the plaintiff was entitled to recover the value of the upper leather, if converted by the defendant, and also the value of the plaintiff's interest, if any, in the sole leather of which they were made.

The jury found a verdict for the plaintiff, and the defendant filed exceptions to the rulings and instructions of the court.

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W. A. Bryant, for the defendant. Brooks and the plaintiff were tenants in common; *Beaumont* v. *Crane*, 14 Mass. 400; and one tenant in common cannot recover for conversion of the common property. *Walker* v. *Fitts*, 24 Pick. 194. In the case of *Stevens* v. *Briggs*, 5 Pick. 177, the desk, for which the plaintiff recovered, was made *for him*. And in *Dresser Manuf. Co.* v. *Waterston*, 3 Met. 9, the plaintiffs had a *special control* of the goods for the conversion of which they maintained their action. See also *Barrett* v. *Pritchard*, 2 Pick. 512.

The first instruction, which the defendant requested, was in the words of the court in *Muggridge* v. *Eveleth*, 9 Met. 237, viz. "the right of possession of one must be paramount," in order to entitle him to maintain an action alone. The present case is distinguishable from all that the plaintiff will rely on, inasmuch as the property, possession, control and right to sell, all passed to Brooks.

The plaintiff never stated, before the trial, what part he claimed, as he ought to have done; but he demanded the whole property. Besides; there was an intermixture of property, so that the plaintiff should have pointed out his portion or part.

The plaintiff's remedy, if any, was under the Rev. Sts. c. 90, §§ 73, 74, by an appraisement and delivery to him, on his giving bond. The case of *Melville* v. *Brown*, 15 Mass. 82, which will be cited for the plaintiff, was decided before the revised statutes had provided the above mentioned remedy; and the officer there knew that he was attaching property owned in part only by the debtor.

N. Wood, for the plaintiff. Paramount right to possession is not necessary to entitle a party to maintain trover; certainly not, in the case of a joint owner. The right to immediate possession is the test. The instruction, on this point, was sufficiently favorable to the defendant. The plaintiff had not given up the right of possession. 2 Saund. 47 *a*. *Weld* v. *Oliver*, 21 Pick. 559. *Walcot* v. *Pomeroy*, 2 Pick. 121 *Stevens* v. *Briggs*, 5 Pick. 177.

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The sole leather was *not sold* to Brooks, as the bills rendered to him show.

The last instruction was also sufficiently favorable to the defendant. *Glover* v. *Austin*, 6 Pick. 209. *Reed* v. *Upton*, 10 Pick. 522. *Marston* v. *Baldwin*, 17 Mass. 606. *Babcock* v. *Gill*, 10 Johns. 287.

There was no more intermixture in this case than in *Stevens* v. *Briggs*, 5 Pick. 177, and *Eaton* v. *Lynde*, 15 Mass. 242, and *Dresser Manuf. Co.* v. *Waterston*, 3 Met. 9. On this point, the plaintiff relies on *Ryder* v. *Hathaway*, 21 Pick. 298.

If Brooks and the plaintiff were tenants in common, yet this action lies, as the defendant sold the whole property. *Melville* v. *Brown*, 15 Mass. 82. *Reed* v. *Howard*, 2 Met. 36.

Wilde, J. Several exceptions were taken to the rulings of the court of common pleas, none of which appear to us to be well founded. Whether the plaintiff was the sole owner of the boots alleged to have been converted by the defendant, or whether he owned them in common with Brooks, from whose possession they were taken by the defendant, is a question not raised by the exceptions; for if they were owned in common, the rulings of the court and the instructions to the jury were sufficiently favorable to the defendant. It is true that the defendant was authorized to attach and take possession of the property; but he had no right to sell the whole property on execution. This subsequent abuse of his authority made him a trespasser *ab initio*, as was decided in *Melville* v. *Brown*, 15 Mass. 82. The defendant could not justify his proceedings on the ground that the plaintiff's property was so mingled with Brooks's, that it was impossible to distinguish what belonged to the plaintiff. The doctrine laid down by the court, in *Ryder* v. *Hathaway*, 21 Pick. 298, 305, is decisive on this point.

It is clear, from the evidence reported, that the plaintiff was either the owner of the whole property taken, or was owner in common with Brooks; and in the latter case, it is clear that the defendant had no right to sell the plaintiff's share, and that the sale was a tortious act amounting to a conversion. *Exceptions overruled.*

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JOHN A. KNOWER & another *vs.* EPHRAIM WESSON.

The *Sts.* of 1840, *c.* 84, and 1841, *c.* 20, which provide, that "where the fact of marriage is required or offered to be proved, evidence of general repute, cohabitation as married persons, or any other circumstantial or presumptive evidence, from which the fact may be inferred, shall be competent evidence for consideration," do not require that the evidence should come from the members or connexions of the family of the parties whose marriage is in question: It may come from any person who knows the circumstances.

WRIT OF ENTRY, to recover possession of a parcel of land in Worcester. At the trial before *Dewey*, J. the demandants claimed title to the demanded premises through John Knower, who acquired the same by a deed made to him by Benjamin Jepson and others, bearing date January 4th 1782. It appeared that said John Knower entered upon said premises under said deed, and occupied them; and no question was made as to his title thereto.

The demandants alleged that said John Knower had a son, John Knower, jr., who was his only heir at law; that his said son died in the year 1812, leaving the demandants his only children, and entitled, as such, to inherit the estate of the said John Knower, sen., who died in the year 1817.

The tenant denied that said John Knower, jr. was ever lawfully married, and also denied that the demandants were his lawful heirs. There was no direct evidence of the actual marriage of John Knower, jr., either by the testimony of witnesses or by record. The demandants proposed, by virtue of *Sts* 1840, *c.* 84, and 1841, *c.* 20, to prove such marriage by evidence of general reputation, by cohabitation of the parties as married persons, and by circumstantial evidence, from which the jury might infer the fact of marriage. The admission of such evidence from any other source than members of the family of said John, was objected to by the tenant; but the objection was overruled, and the evidence of other persons admitted.

A verdict was returned for the demandants. New trial to be ordered, if the evidence objected to was erroneously

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admitted; otherwise, judgment to be rendered on the verdict.

Bridges, for the tenant, cited 1 Greenl. on Ev. § 107. *Evans* v. *Morgan*, 2 Tyrw. 396, and 2 Crompt. & Jerv. 453. 1 Phil. Ev. (8th ed.) 206.

Newton, for the demandants, cited *Jackson* v. *Claw*, 3 Johns. 346. *Senser* v. *Bower*, 1 Pennsyl. 450.

SHAW, C. J. If there were any doubt of the admissibility of the evidence objected to, at common law, the objection is wholly removed by *St.* 1840, *c.* 84, and *St.* 1841, *c.* 20. By the former, the admission of this evidence was limited to cases of divorce; by the latter, it was extended to "all cases where it shall become necessary to prove the fact of marriage." The evidence, thus declared competent, is that of "general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence, from which said fact [of marriage] may be inferred." Such was the evidence offered, objected to, and admitted. There is no intimation in the statute that the testimony must come from members or connexions of the family. It may come from any one who knows the circumstances.

Judgment on the verdict for the demandants

PETER SAWYER *vs.* CHARLES RYAN.

In an action of trespass on real estate, brought originally in the court of common pleas, the plaintiff is entitled, under Rev. Sts. *c.* 121, §§ 3, 13, to full costs, if he prevails, though he does not recover damages exceeding twenty dollars.

In an action of trespass, the declaration alleged that the defendant "broke and entered the plaintiff's dwelling-house in L., being the same dwelling-house occupied by the plaintiff, with force and arms, and did then and there imprison the plaintiff, for the space of one hour, without any legal or probable cause." *Held*, that this was an action of trespass on real estate — an action of trespass *quare clausum fregit* — and that the place of the alleged trespass was sufficiently designated by name, according to the requisition of *St.* 1839, *c.* 151, § 3.

THIS was an action of trespass, originally brought in the court of common pleas. The first count in the declaration

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alleged "that said Ryan, on the first day of May last, [1846,] broke and entered the dwelling-house of said Sawyer, situate in Lancaster, being the same dwelling-house occupied by said Sawyer, with force and arms, and did then and there take and imprison the said Sawyer for a long space of time, to wit, for the space of one hour, and held him so imprisoned during all the said time, without any legal or probable cause, against the will of said Sawyer, and against the law of the land, and during said imprisonment threatened said Sawyer, and put him in great fear, for the purpose of unjustly extorting money from said Sawyer, and other wrongs to said Sawyer then and there did, against our peace," &c. The second count, after averring the breach and entry of the plaintiff's dwelling-house, as in the first count, alleged that said Ryan "did then and there take and imprison said Sawyer, and held him there detained for a long time, to wit, for the space of one hour, without any legal or probable cause, against the law of the land, and against the will of said Sawyer, and other wrongs to said Sawyer then and there did," &c. The third count averred the breach and entry of the plaintiff's dwelling-house, as in the first two counts, and alleged that the defendant 'then and there threatened said Sawyer, and put him in great fear, and endeavored to induce and compel him to pay a large sum of money to him, the said Ryan, without any legal cause, against the law, and against the will of said Sawyer, and other wrongs then and there did," &c.

The defendant pleaded the general issue, and set forth, in a specification of defence, that he should justify, on the ground that, at the time and place mentioned in the plaintiff's writ, the defendant was acting as assistant of a constable of the town of Lancaster, who had lawfully commanded his aid in the service of a search warrant; and that all the trespasses, pretended in the plaintiff's writ, were lawful acts done as such assistant.

A trial was had in the court of common pleas, before *Merrick*, J. and a verdict was found for the plaintiff, and damages

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assessed at one cent. The plaintiff moved for full costs which the court allowed. The defendant alleged exceptions.

E. Fuller, for the defendant. By Rev. Sts. *c.* 121, § 3, only one quarter part of the damages recovered is to be taxed as costs, in actions originally brought in the court of common pleas, if the plaintiff recovers not more than $20, "except actions of trespass on real estate," &c. The present cannot be considered an action of trespass on real estate; especially since the *St.* of 1839, *c.* 151, § 3, requires that, in such action, "the close or place of the alleged trespass shall be designated, in the writ and declaration, by name or abuttals, or other proper description." The plaintiff's declaration gives no designation or description of the place of the alleged trespass.

Bacon, for the plaintiff. Whenever, in an action for injury to real estate, the plaintiff can be put upon proof of title to the estate, he may sue in the court of common pleas, though he might sue before a justice of the peace, and is entitled to full costs. See Rev. Sts. *c.* 85, § 1; *c.* 121, §§ 3, 13. *Dummer* v. *Foster*, 7 Mass. 476. *Shurtleff* v. *Hutchins*, 10 Met. 248.

The place of the alleged trespass is sufficiently designated by name, in the writ. It is termed the dwelling-house of the plaintiff, in Lancaster, occupied by him.

Shaw, C. J. The plaintiff commenced his action in the court of common pleas, and recovered damages not exceeding $20; whereupon the plaintiff claims full costs, the right to which, under the statute, is denied by the defendant. This question, though involving but a small amount in the particular case, is an important one in practice. The law upon this subject has been so much altered by the revised statutes, that decisions under former statutes throw little or no light on the question. The provision now is, Rev. Sts. *c.* 121, § 13, "in all real actions, and in all actions of replevin and of trespass on real estate, actions on the case for disturbance of any easement, and all others, in which the title to real estate may be concerned, the party finally prevailing shall recover full costs

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without regard to the amount of damages, if any, recovered in the action." This exception to the rule of one quarter as much cost as damage, in all actions "in which the title to real estate may be concerned," necessarily leads to the inquiry, how it shall appear that the title to real estate is concerned.

Formerly it was considered that the defendant must put in a plea of soil and freehold, or other special plea, by which the title to real estate shall be put in issue. But by the existing provision above cited, it is clearly not intended that it must appear by the pleadings. It is even provided in Rev. Sts. c. 85, § 11, that in actions before a justice of the peace, the defendant need file no plea in writing, but may orally deny the plaintiff's right to maintain his action, which the justice shall enter on his record. Then, whatever may be the form of the action, trespass on real estate, or for assault and battery, assumpsit or other kind of action, whenever one party asserts a right to any real estate, which the other denies, the fact, if not otherwise appearing, shall be stated on the record; and if either party requests the same to be removed into the court of common pleas, it shall be done, and there entered and proceeded in, as an original action. Rev. Sts. c. 85, § 3. But if neither party desires to remove it, then, though the title to real estate is in question, the justice is not ousted of his jurisdiction, and he may go on and try it. But still, in order to secure a trial by jury, to either party wishing it, the case is open to appeal. But the difference will be this: If it appear by the justice's record, that the title to real estate was in question, though neither party requested its removal, then the plaintiff in case of recovering less than $20, is still within the exception, and shall recover his full costs; but if no such entry appears on the justice's record, it is not within the exception, and the party shall recover a quarter costs only. The policy of these provisions is stated in the report of the commissioners, in note to Rev. Sts. c. 85.

The general rule therefore is, that where a party brings his action for more than $20, (which he must bring originally in the common pleas,) and the event shows that he had a good

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cause of action for only a sum less than $20, he shall recover but one fourth as much costs as damages; because he ought to have gone to the cheaper and nearer tribunal. To encourage him to do so, when he has a plain, simple demand, which he has no reason to believe will involve an expensive controversy respecting the title to real estate, the law provides, that if his adversary will, in contesting such small claim, collaterally put in issue a title to real estate, he shall do it at the peril of paying the full costs, as if the plaintiff had brought his action originally in the higher court. But this applies only to actions not likely to draw in question the title to real estate, but excepts, in terms, those which do, or are likely to bring such question in issue. Accordingly, the exceptions are replevin, trespass on real estate, case for disturbance of an easement, which are likely to involve a question of title, and then adds all others, in which the title to real estate may in fact arise in the cause. Trespass on real estate is specifically excepted, and therefore comes within the still more general rule, that the party prevailing shall recover his costs. Rev. Sts. c. 121, § 1.

The only remaining question is, whether this is an action for trespass on real estate. The declaration, in each of its three counts, is somewhat anomalous, leaving it a little doubtful, whether the pleader intended the declaration as a charge of *quare clausum fregit*, or for the injury to his person by false imprisonment. No assault is alleged, and the imprisonment might have consisted in locking the plaintiff in, without assault. By *St.* 1839, *c.* 151, § 3, it is provided that, in actions *quare clausum fregit*, the close *or place* shall be designated by name, or abuttals, or other proper description. We think the terms "dwelling-house," of the plaintiff, in "his occupation," are a good description by name, and that the averment of breaking and entering is the averment of a trespass on real estate. The plaintiff is therefore entitled to his full costs, although he recovered but one cent damages.

Exceptions overruled

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James Kirby, Jr. *vs.* Nathaniel Tead & wife.

A wife, by joining with her husband in a written contract with a mechanic for furnishing labor or materials for erecting a building on her land, does not thereby create a lien on her estate in the land for the amount due to the mechanic for such labor or materials, under the Rev. Sts. *c.* 117, and therefore cannot properly be joined with her husband in a petition, by the mechanic, that the land may be sold for a breach of such contract: But such contract creates a lien on the husband's estate in the land, and if she be joined in such petition, the petitioner may discontinue as to her, and proceed against the husband for a sale of his estate in the land.

By a written contract with a mechanic, made by a husband and wife, for the erection of a building on the wife's land, it was provided that the last payment, of $430, to the mechanic should be made "upon the entire fulfilment of the contract, in all its parts, on or before the first day of May" 1844: There was also a provision in the contract, that if any difficulty should arise between the parties, in the construction or execution thereof, it should be submitted to the decision of two housewrights: The building was not completed on the first day of May 1844, but was completed on or before the tenth day of June following: A difficulty arose between the parties, as to the construction and execution of the contract, and they submitted the matter, on the twelfth day of June 1844, to two housewrights, who decided, on the fourteenth day of said June, that the husband and wife should pay to the mechanic a balance less than $430; and on the thirteenth day of December 1844, the mechanic filed a petition that the land on which the building was erected might be sold, and the proceeds of the sale be applied to the discharge of the balance found due to him by the housewrights. *Held*, that the mechanic's lien on the husband's estate in the land was not dissolved at the time of the filing of the petition, by virtue of the provision in Rev. Sts. *c.* 117, § 3, that "the lien shall be dissolved at the expiration of six months after the time when the money due by the contract, or the last instalment thereof, shall become payable, unless a suit for enforcing the lien shall have been commenced within the said six months."

At the time when a husband and wife made a contract with a mechanic to furnish labor and materials for the erection of a building on the wife's land, they had not had a child born alive; but after the mechanic filed a petition that the land might be sold for breach of the contract, pursuant to the Rev. Sts. *c.* 117, they had a child born alive. *Held*, that the mechanic's lien extended to the husband's estate in the land as tenant by the curtesy initiate.

This was a petition, filed on the 13th of December 1844, praying for an order for the sale of certain premises, pursuant to the provisions of the Rev. Sts. *c.* 117, which give a lien to mechanics and others for the cost of repairs and improvements on real estate. The case was submitted to the court on the following statement of facts:

On the 21st of August 1843, a lot of land was conveyed to Mary A. Tead, one of the respondents, then and ever since

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the wife of Nathaniel Tead, the other respondent. On the 15th of October 1843, a written contract for the building of a house on said land was made by James Kirby, jr. the petitioner, said Mary A. and Nathaniel, and duly recorded. Said contract, after stating the agreements on the part of said Kirby, as to the performance of the work, contains the following provisions: "And the said Nathaniel Tead and Mary A. Tead, in consideration of the aforesaid agreements and contracts on the part of the said James Kirby, jr. do, on their part, covenant and agree with him, that they will pay, for the faithful and complete execution of this contract on his part, the sum of sixteen hundred and thirty dollars, in time and manner following, to wit: when the frame is raised, three hundred dollars; (the cellar and underpinning under the main parts being previously finished;) when the house is boarded and shingled, two hundred dollars; when the clapboarding is completed, three hundred dollars; when the house is plastered, four hundred dollars; and the remaining sum of four hundred and thirty dollars, upon the entire fulfilment of the contract, in all its parts, on or before the first day of May next. And if any difficulty shall arise between the parties, in the construction of this contract, or the execution thereof, the same shall be submitted to the judgment and decision of two housewrights of the town of Worcester, one to be named by said Nathaniel Tead, the other by said James Kirby, jr.; but if the referees cannot agree in opinion, they shall appoint an umpire to decide the matter."

Said house was not completed on the 1st day of May 1844, but was, on or before the 10th day of June 1844. On the 12th day of said June, an indorsement, signed by all the parties, was made on said contract, reciting that they did not agree in the construction and execution of the contract, and appointing Mason H. Morse and Theodore W. Cunningham, and submitting to them (with power to appoint an umpire, if they should not agree) the decision of the matter, and covenanting to abide by their award, and to perform the same, on demand, after due notice thereof.

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On the 14th day of the same June, the said Morse and Cunningham, after due consideration, made the following award: "This may certify that we, the referees of Nathaniel Tead and Mary A. Tead and James Kirby, jr. have examined the house, fences, &c. built by said Kirby, jr. for Nathaniel and Mary A. Tead, and have decided that the said Nathaniel and Mary A. shall take the whole house, fences, and every other part of said job described in the contract of Nathaniel and Mary A. Tead and James Kirby, jr. and shall pay for the whole job, as is certified in the contract, and all extra charges which said Kirby may have against the said Nathaniel and Mary A. Tead, up to the fourteenth day of June 1844, to the sum of $1566·00. Mason H. Morse,
Theo. W. Cunningham."

Notice of said award was given to said Kirby and Nathaniel and Mary A. Tead, and the payment of the balance due ($64) demanded by said Kirby. Up to the time of the filing of the petition, said Nathaniel had no issue by said Mary A.; but since that time they have had one child.

Judgment to be for the petitioner or for the respondents, as the court shall order, on the petition and foregoing statement. If for the petitioner, the sum of seventy five dollars is to be taken as the amount due on the contract, at the time of filing the petition.

F. H. Dewey, for the petitioner. The question is, whether this case is within the provisions of the Rev. Sts. *c.* 117, §§ 1 – 5, which give a lien on land to persons furnishing labor or materials for erecting or repairing buildings thereon. By § 3, "the lien shall be dissolved at the expiration of six months after the time when the money due by the contract, or the last instalment thereof, shall become payable, unless a suit for enforcing the lien shall have been commenced within the said six months." Parties may, by agreement, extend the time of payment. And these parties, by the provision for a reference, which was carried into effect, and by the referees' award, made the last instalment payable on the 14th of June 1844· and this suit was commenced within six

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months from that date. See *Foster* v. *Stone*, 20 Pick. 542. *Thaxter* v. *Williams*, 14 Pick. 49. No action lies for non-payment, till the fact, on which payment is to be made, is ascertained. *Barnes* v. *Parker*, 8 Met. 134.

If it be said that the land was owned by a feme covert, who could not charge it with a lien, the answer is, that we do not attempt to charge her on any common law doctrine, but by virtue of the Rev. Sts. *c.* 117, § 1, which provide that "every person who shall, by contract with *the owner of any piece of land*, furnish labor," &c. "shall have a lien upon the whole piece," &c. Any and every owner is within this section. The female respondent could have alienated her whole interest in this land by a deed made jointly with her husband. *A fortiori* she may charge it with a lien for her benefit. But. at least, the estate of the husband in the land is bound by the lien. By the Rev. Sts. *c.* 117, § 26, a life estate, or any estate less than a fee simple, is brought within the other provisions of the chapter.

If the wife is not chargeable in this suit, the petitioner will discontinue as to her. Rev. Sts. *c.* 100, § 22. *Fitch* v. *Stevens*, 2 Met. 505. *St.* 1839, *c.* 151, § 2.

J. C. B. Davis, for the respondents. 1. This suit was not brought within six months after the 10th of June 1844, when the last instalment was payable; there being then an "entire fulfilment of the contract in all its parts." On that day, the petitioner might have sued on the contract. *Helps* v. *Winterbottom*, 2 Barn. & Adolph. 431. *Manufacturers & Mechanics Bank* v. *Gore*, 15 Mass. 75. The agreement to refer was no bar to a suit on the contract. *Thompson* v. *Charnock*, 8 T. R. 139. That agreement was made for the purpose of fixing the amount to be paid, and not for the purpose of enlarging the time of payment. Real estate is to be affected by the decision of this question. A record was made of the contract, to which all persons might refer and in which they could see only the 10th of June, as the day from which six months were to run.

2. The wife is not liable on the contract. Chit. Con

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(6th Amer. ed.) 176. In order to give a lien, the contract must be such as can be enforced at common law. She can convey her real estate only by deed. 2 Story on Eq. § 1391. *Powell* v. *Monson & Brimfield Manuf. Co.* 3 Mason, 347. *Lane* v. *McKeen*, 3 Shepley, 304. *Ex parte Thomes*, 3 Greenl. 50. *Watrous* v. *Chalker*, 7 Connect. 224. And she could not enter into a reference to enlarge the time of payment. Com. Dig. Arbitrament, D. 2. Kyd on Awards, (1st ed.) 20.

The husband is not liable as tenant by the curtesy, as no child was born to him before the suit was commenced. And as this is an action on a joint contract, it cannot be maintained against him alone. A discontinuance against the wife will not, therefore, enable the petitioner to proceed. See *Bliss* v. *Bliss*, 12 Met. 266.

Shaw, C. J. Several questions arise in this case, upon the statement of facts agreed, by which it appears that the petitioner seeks to enforce the payment of a balance due to him upon a building contract, under the Rev. Sts. *c.* 117, giving to mechanics a lien in certain cases.

1. This being a contract by the husband and wife jointly, with the petitioner, it is objected that, as a feme covert, she cannot bind herself by an executory contract, and therefore cannot bind her estate.

It is a well established rule of law, that a married woman cannot bind herself by an executory contract. And as the lien is created by statute, as incident to the contract, when there is no valid contract, there is no lien. Even where, under the old common law of Massachusetts, now sanctioned by statute, a married woman was permitted to alienate her separate estate without fine, by joining in a deed with her husband, it was held that when she had so joined in a deed, by which her interest in her estate was bound, yet she was not bound by the covenants. *Colcord* v. *Swan*, 7 Mass. 291.

Were the female respondent's interest in the estate bound by her contract, the whole estate might be sold (Rev. Sts. c. 117, § 20) to discharge a small lien, and a large surplus be

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converted into personal property and paid to the husband; and thus the estate of the wife would be defeated. It is insisted, as a case in point, that a married woman may, by joining in a deed with her husband, convey away her own estate, and that this building contract is the execution of the same power in another mode. It is true she may join in conveying her estate by deed; but it was from early times regarded as an exception to a general rule, and limited to the precise case. And since the rule has been sanctioned by statute, as a rule of positive law, it is under the same limitation, viz. that the wife shall not be bound by any covenant contained in such joint deed. Rev. Sts. c. 59, § 2.

But we think there is no objection to the petitioner's discontinuing, against the wife, without costs, so as to have a judgment against the husband alone, if entitled to it. 7 Mass. *ubi sup.* *Fitch* v. *Stevens*, 2 Met. 505.

2. The next question is, whether the lien was dissolved by the lapse of six months after the last instalment became due by the contract, before this suit was commenced. Rev. Sts. c. 117, § 3. This must depend upon the terms of the contract. The suit was commenced on the 13th of December 1844.

The contract, after describing the work to be done, and the payments to be made, from time to time, as certain parts of the work should be done, concludes thus: "And the remaining sum of $430 upon the entire fulfilment of the contract, in all its parts, on or before the 1st of May next," (1844.) Now, when the statute says "due by the contract," it must be understood to mean, due by the force and effect of the contract, taken all together. The last payment under this contract was not to be made absolutely on the 1st of May, but on the complete fulfilment and performance of the contract. This was contemplated to be on the 1st of May; but it might not be, and in fact was not. But it is insisted, that as the house was completed on the 10th of June, the last payment then became due; and this was more than six months. But although it is stated that the house was completed on the 10th of June, yet it does not follow that this was an entire

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fulfilment of the contract in all its parts, so that the money would necessarily be payable. On the contrary, the respondent denied that it was fulfilled, and that he was so liable to pay. And the fact, that the referees made a deduction from the contract price, tends strongly to show that the contract was not fulfilled in all its parts; although, under their powers as arbitrators, they awarded that the respondent should accept it and pay for it, with such deduction.

We are then to consider the other part of this original agreement, made at the same time, and recorded with it, for the information of all persons concerned. This part of the original contract was, that if any difficulty should arise between the parties in the construction of the contract, or in the execution thereof, it should be left to the judgment and decision of referees. Such difficulty did arise, it was so referred, and the referees awarded, on the 14th of June, that the respondents should accept the house, &c. as and for the job contracted for, at a price somewhat less than the contract price, that is, with a deduction from the price, and pay for the same accordingly. This, being within the scope of their authority, fixed the amount and time of the last payment due by the contract as the 14th of June, and the suit, commenced on the 13th of December, was within six months from that time.

3. The remaining question is, what is the extent to which the petitioner's lien, under this contract, reaches, and what right or interest in the estate he may require to be sold, by force of the statute. The Rev. Sts. c. 117, § 26, explicitly declare, that "if the person, who procures the work to be done, has an estate for life only, or any other estate less than a fee simple in the land on which the work is to be done, or if the land, at the time of recording the contract, is mortgaged, or under any other incumbrance, the person who procures the work to be done shall nevertheless be considered as the owner, for the purposes of this chapter, to the extent of his right and interest in the land, and the lien before provided for shall bind his whole estate and interest therein."

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The estate which the husband had in the land of his wife, at the time the contract was made, (they then having no issue,) was a right to the rents and profits during their joint lives; that is, an estate for his own life, determinable by the death of the wife. But the possibility of having issue born alive then existed, and that event would convert his estate into a tenancy by the curtesy initiate. Should the wife survive, the estate would be the same as before, and terminate with his life; but should he survive, he would hold it for his own life; so that the tenancy by the curtesy initiate was a larger estate. 2 Bl. Com. 127. It appears by the facts agreed, that since the filing of the petition, the respondents have had issue born alive; by means of which the husband's interest has been enlarged to a tenancy by the curtesy initiate, and the question is, whether the lien extends to the estate thus enlarged.

What would have been the result, had the husband acquired a new estate by a new title, it is not necessary to inquire. Here the estate was enlarged, in pursuance of a possibility, which existed at the time the contract was made, and constituted part of its value; and in this respect operated like the termination of a lease, or the removal of an incumbrance. We are therefore of opinion that the lien of the petitioner extends to the present interest of the husband, as tenant by the curtesy initiate, or an estate for his own life, whether he survive his wife or not. *Decree accordingly.*

James Pitts & others *vs.* The Lancaster Mills.

A., the owner of land and mills on a stream above the land and more ancient mill of B., on the same stream, raised his mill dam higher than it formerly was, and kept back the water as long as was necessary to fill his mill pond, and no longer, whereby B.'s mill was temporarily stopped. *Held*, that this was not an unreasonable use of the stream by A., and that B. had no cause of action against him.

This was an action of trespass upon the case: and the declaration alleged that Samuel Carter was seized and possessed

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of a close, water mill, ancient dam, and the water privileges thereto appertaining, situate on the north branch of Nashua River, in Lancaster, and the right of having the whole water of said stream flow, without obstruction, for the benefit of said mill, and of having the uninterrupted use and occupation of said mill and privileges; and that said Carter, being so seized and possessed, leased the said premises, for a term of years, to Hiram Pitts, who underlet the same to the plaintiffs; that the defendants, a corporation established by *St.* 1844, *c.* 20, in the months of June and July 1845, wrongfully built and raised, above its usual height, their dam, situate across said stream, above the mill, dam and privilege occupied by the plaintiffs, and thereby hindered the water from flowing in its usual course, and thereby, for the space of two days during the said month of June, and four days during said month of July, wholly cut off the water from the plaintiffs' mill, &c.

The case was submitted to the court upon the following agreed statement of facts: "The plaintiffs are the lessees of said mill, dam and privileges, as alleged in their declaration. The defendants were the owners of a privilege on said stream, above the mill of the plaintiffs, whereon a mill had stood for some years; they erected a new mill thereon, and, for the purpose of using the whole power, raised the dam higher than it had formerly been, and kept the water back, so long as was necessary to fill their pond, and no longer. To have delayed filling said pond, until a freshet or flow of water should have raised the same, would have endangered said dam; and by keeping the water back, as aforesaid, the operations of the plaintiffs' mill were retarded or wholly suspended."

The parties agreed that if, upon the facts above stated, the action could be maintained, damages should be assessed by an auditor; otherwise, that a nonsuit should be entered.

F. H. Dewey, for the plaintiffs. As the defendants' privilege is a recent one, and the plaintiffs' an ancient one, the defendants had no right to withhold the water, nor to raise their

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dam. *Hodges* v. *Raymond*, 9 Mass. 316. *Sumner* v. *Tileston*. 7 Pick. 198. *Sackrider* v. *Beers*, 10 Johns. 241. *Merritt* v. *Brinkerhoff*, 17 Johns. 306. *Buddington* v. *Bradley*, 10 Connect. 213.

Any impediment of the stream, by the defendants' dam, whereby the plaintiffs' profits are diminished, is actionable. Angell on Watercourses, (3d ed.) 94–98, and American cases there cited. *Brown* v. *Best*, 1 Wils. 174. *Saunders* v *Newman*, 1 Barn. & Ald. 258. *Bealey* v. *Shaw*, 6 East, 214. *Thompson* v. *Crocker*, 9 Pick. 59.

C. Allen, for the defendants. The plaintiffs' action, and the argument in support of it, proceed on the unwarranted assumption that they have an absolute, instead of a qualified, right to the use of the water that flows over their premises. They have a right only to such a use as is consistent with a reasonable use by others; and the defendants have not deprived them of such use. *Palmer* v. *Mulligan*, 3 Caines, 307. *Tyler* v. *Wilkinson*, 4 Mason, 401. *Boynton* v. *Rees*, 9 Pick. 528. *Cary* v. *Daniels*, 8 Met. 476, 477. Angell on Watercourses, (3d ed.) 20.

Shaw, C. J. Every proprietor of land, through which a current of water flows, has a right to the use of it on his own and, amongst other things for mill purposes, making such reasonable use of it, and of the mill power furnished by it, as he can make consistently with a like reasonable use by other proprietors, above and below, through whose land it passes. What is a reasonable use must depend on circumstances; such as the width and depth of the bed, the volume of water, the fall, previous usage, and the state of improvement in manufactories and the useful arts. 8 Met. 476.

It appears by the facts stated in this case, that the defendants were proprietors of land and mills above those of the plaintiffs on the same stream; that having erected a new dam, which they had a right to do, they detained the water no longer than was necessary to raise their own head of water and fill their own pond. The court are of opinion that

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this was not an unreasonable use of the watercourse by the defendants, and that any loss, which the plaintiffs temporarily sustained by it, was *damnum absque injuria.*

Plaintiffs nonsuit.

JOHN FARNUM & others *vs.* DAVID BOUTELLE, Administrator.

When a debtor, who has mortgaged personal property to secure a debt, dies insolvent, the mortgagee cannot prove his debt in full, before commissioners appointed to examine the claims against the deceased's estate, unless he first waives his mortgage; but if he applies the amount of the mortgaged property towards the discharge of his claim, and a balance is left unpaid, he may prove such balance before the commissioners.

A mortgaged to F. certain machinery owned by A. & B. in common, to secure payment of $2500: F. assigned the mortgage to F. & Co., and B. sold his interest in the machinery to F. & Co.: A. used the machinery, until his death, in manufacturing cotton goods, which he sent to F. & Co., to be sold by them on commission, and on which they made advances to him: When A. first sent goods to F. & Co. for sale, they charged said $2500 to him, in the account kept by them with him, and when they forwarded the account, they wrote to him that they should consider the mortgage in force, as collateral security: This charge was never withdrawn from F. & Co.'s account with A., though they rendered accounts current semiannually till his death, and the credits given to him amounted, in the aggregate, to $74,000; the balance of each account, however, being against him: After his death, his estate was represented to be insolvent, and his administrator sold, at auction, "all the right, title and interest A. had in the machinery" aforesaid, to P., one of the firm of F. & Co., who stated, at the auction, that he had a valid mortgage thereon, upon which nothing had been paid: F. & Co. afterwards presented their claim for said $2500, for proof and allowance, to the commissioners appointed to examine claims against A.'s estate, and contended that said mortgage was discharged, by being charged in account as aforesaid. *Held*, that the mortgage was in full force; that P. purchased only an equity of redemption; and that the claim for said $2500 could not be legally proved against A.'s estate.

A. ordered goods to be packed and forwarded to F. & Co., commission merchants, to whom he owed a balance, on account, and wrote a letter of advice, enclosing an invoice, but died before the letter was mailed or the goods had left his premises, and his son, on the day after his death, forwarded the letter and the goods, and F. & Co. sold them, and gave credit for the proceeds, in reduction of their balance against A., whose estate was insolvent. *Held*, that F. & Co. had no lien on these goods, for the balance of their account against A., and that they must pay over the said proceeds to A.'s administrator.

THIS was an appeal, taken by David Boutelle, administrator of the estate of Percy Atherton, deceased, from the decision of commissioners appointed to examine the claims of creditors

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against said estate, which was duly represented to be insolvent. The trial was before *Hubbard*, J. who made the following report thereof:

The amount of the plaintiffs' claim was admitted by the administrator, subject to the objections hereinafter stated.

It was proved on the trial, that in the year 1832, certain machinery of the value of $10,500 was bought by said Atherton and William Buffum, and the bill of sale taken in the name of Atherton, but agreed to be the joint property of the two. By consent of Buffum, and for the mutual benefit of him and Atherton, the machinery was immediately mortgaged to John Farnum, one of the plaintiffs, for $2500, he having advanced that sum in part payment of the purchase money. In 1839, said Buffum sold all his interest in the machinery to said John Farnum. Before that time, viz. in 1835, said Farnum assigned the said mortgage to the plaintiffs, who are commission merchants in Philadelphia. At the time of this assignment of the mortgage, the said Buffum and Atherton were using the machinery, in the name of Atherton, in the manufacture of cotton goods at Fitchburg, and so continued till Buffum sold his interest in it, as aforesaid; and afterwards Atherton continued to carry on said business till his death. The goods manufactured were sold by the plaintiffs, who, from time to time, made advances thereon, keeping an account current with the manufacturers, under the name of "the Stone Mill."

Soon after the transfer of said mortgage to the plaintiffs, the amount due thereon was charged to "the Stone Mill," in the account kept by the plaintiffs with that concern, and was never withdrawn from that account. Accounts current were rendered half yearly, by the plaintiffs, to the manufacturers, during all the subsequent years.

Between the time of the charge of the amount of the mortgage to "the Stone Mill," and the time of the sale to Farnum of Buffum's interest in the machinery, there were credits to "the Stone Mill," the aggregate amount of which was $74,000; but the balance, on the rendering of each account, was in favor of the plaintiffs.

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On the 9th of January 1844, the defendant, as administrator of the estate of Atherton, sold at auction "all the right, title and interest Percy Atherton had in the machinery in the Stone Mill, and lease of the mill," which machinery was that in question. Peter Farnum, one of the plaintiffs, was present at the sale, and on being called upon by the defendant to state his claims, he then said he had a good and valid mortgage on the machinery, given in 1833, and that nothing had been paid on it. The defendant (the administrator) then said that he should sell, subject to whatever incumbrance was on it, and that the purchaser must take his risk. It was bid off by said Peter Farnum, at $3500, being the fair value of one half of the machinery, and somewhat more than the sum at which it was appraised.

It was shown in evidence, that twenty nine bales of cotton goods, which were sold by the plaintiffs, and for the proceeds of which the sum of $1752·81 was credited in their account, were put into a wagon, by direction of Atherton, the day before his death, to be forwarded to the plaintiffs, and that an invoice of them was made; but that the goods had not left Atherton's premises at the time of his death, but were forwarded to the plaintiffs, by Atherton's son, the day after his death.

The defendant contended that he was entitled to receive the proceeds of said goods; and it was agreed by the parties that if such should be the opinion of the court, the above sum should be added to the plaintiffs' claim against said Atherton's estate. It was further agreed by the parties, that upon the facts above stated, judgment should be rendered for the plaintiffs for such sum as, in the opinion of the court, may be due, and that, on such judgment, the plaintiffs should have such dividend as should be decreed for the creditors of said Atherton.

C. Allen & N. Wood, for the plaintiffs.

Barton & Bacon, for the defendant.

It was agreed at the argument, that when the plaintiffs forwarded the first account, in which the $2500 were charged to

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the "Stone Mill," they wrote to Atherton, that they should consider the mortgage in force as collateral security.

Shaw, C. J. The facts in this case are somewhat complicated, but when analyzed and understood, we think it will not be difficult to ascertain the rights of the parties. It appears that John Farnum & Co. are commission merchants in Philadelphia, of which firm Peter Farnum was a partner; that the deceased, Percy Atherton, was a manufacturer at Fitchburg, in this county. Atherton and David Buffum, for their joint account, purchased the machinery of a factory, and Atherton mortgaged his undivided half to John Farnum, to secure his note to Farnum or order, for $2500. Atherton carried on the business of manufacturing at a place called the Stone Mill, and consigned his manufactured goods to the plaintiffs at Philadelphia, as factors, for sale, and the plaintiffs advanced large sums to Atherton; and this continued to the death of Atherton. About the time this account was opened, John Farnum indorsed the note for $2500, and assigned the mortgage, given to secure it, to John Farnum & Co. who charged the note in their account current, but at the same time gave Atherton notice, that they still considered the mortgage in force as collateral security.

Now, it is contended by the plaintiffs, that as this note was charged as an item in an extensive account current, and the amount, many times over, afterwards credited, the earliest credits, by the rules of appropriation, must be applied to the payment of the earliest debits, and so the note must be deemed absolutely paid, and the mortgage discharged, although there was constantly a large cash balance due, on such account, from Atherton to the plaintiffs. But these conventional rules respecting the appropriation of payments are adopted only in the absence of proof of the agreements or acts of the parties regulating such application of payments. It is always at the election of a party indebted to another on more than one account, on paying money, to elect on which account the payment shall be applied; and this election being notified to the creditor, if he accept the payment, it shall be

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deemed a payment on the account to which the debtor has directed it to be applied. *Reed* v. *Boardman*, 20 Pick. 441. So here, Atherton, having received notice from John Farnum & Co. that they still considered the mortgage in force, might, on consigning goods to them, have directed the proceeds to be applied specifically to the payment of the debt thus secured by mortgage; and if they had accepted the consigned goods, sold them, and received money for the proceeds, to the amount of that note, it must have been deemed *de facto* payment, and the mortgage discharged. This, however, never was done; the goods were consigned on general account, and the plaintiffs were always in advance to Atherton.

Such was the state of things when Atherton died; and on his estate being represented insolvent, the defendant, as his administrator, brought his estate and effects to a sale at auction, at which Peter Farnum, one of the partners in the firm of John Farnum & Co. attended; the firm, as it appears in this case, being large creditors. The state of the factory and machinery was this: John Farnum & Co. had purchased one undivided half of the machinery of Buffum, the original co-purchaser with Atherton. Atherton had obtained a lease of the premises where the business was carried on, and had an unexpired term therein. The interest, which the administrator proposed to sell, was an undivided half of the machinery, with the unexpired term in the mill, and the advantages incident thereto.

A question then arose, whether the machinery, thus to be sold, still remained subject to the incumbrance of said mortgage. Peter Farnum, being called upon, said he had a good and valid mortgage on the machinery, and that nothing had been paid upon it. The administrator then said he should sell, subject to whatever incumbrance was on it, and that the purchaser must take his risk. Peter Farnum became the purchaser at $3500. Now, whether any other purchaser might have successfully contested that mortgage with John Farnum & Co. for whose account it was purchased, or not, we think that *they* could not. After the declaration of Peter Farnum

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that the mortgage was in force, he must be taken to bid for the equity of redemption, and to take it, if the highest bidder, as an equity of redemption; that is, the sum to be given after deducting the $2500 for which it stood mortgaged. It has substantially the same effect as if enough of the machinery had been taken out to pay the $2500, and then bids were made for the residue. Such a declaration on the part of the holder of the mortgage would have a natural tendency to deter other buyers, and therefore he, and those for whom he acts, must be estopped from afterwards insisting that the mortgage was paid and discharged, by credits in account, especially credits given for proceeds of goods, on which new advances were constantly made. The court are therefore of opinion, that the $2500, thus deemed paid by the mortgaged goods, must be stricken out of the general account. The specific question is, whether the sum of $2500, part of the plaintiffs' demand against the estate of the deceased insolvent, should be allowed; and this depends on the question, whether that debt has been paid, and the mortgage discharged, by its being introduced into the general account of the firm. For, if the mortgage remained in force at the time of the decease of the debtor, then it is very clear, as well upon principle as authority, that the creditors cannot prove their debt, without first waiving their mortgage, or, in some mode, applying the amount thereof to the reduction of the debt, and then proving only for the balance. *Amory* v. *Francis*, 16 Mass. 308. But in the present case, it is apparent from the evidence, that one half of the machinery upon which the mortgage, if in force, was a lien, exceeded the sum of $2500, and therefore if the plaintiffs retained the mortgage, no part of the $2500 can be proved. Being of opinion, for the reasons stated, that the mortgage did remain in force, and was so declared by one of the partners, when the mortgaged property was offered for sale, they are bound by it, and therefore cannot prove that $2500.

In regard to the other question raised on the report, the court are of opinion, that the plaintiffs are bound to account

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to the administrator for the $1752·81, in cash, and have no right to credit them, in their general account with the intestate, in reduction of their claim. A factor has undoubtedly a lien upon all goods of his principal, consigned to him for sale, and in his actual or constructive possession, for his general balance. But before such lien attaches, the goods must have been delivered or sent to the consignee, or, at least, put upon their transit to him; and an intention so to consign them, and an intimation of such intention by letter, whilst they remain in the actual possession and custody of the consignor, is not sufficient to create a lien. In the present case, it appears that the goods remained on the premises of the intestate at the time of his decease, and were subsequently forwarded by his son. But by whomsoever they were forwarded, it must have been without authority. It could not be by authority of the intestate, because all authority conferred by him ceased with his death; nor by the administrator, for he was not then appointed. But when the administrator was appointed, the property vested in him, by relation, from the decease of the intestate. Com. Dig. Administration, B. 10. *Long* v. *Hebb*, Style, 341. *Wonson* v. *Sayward*, 13 Pick. 404.

The goods, when forwarded, were the property of the administrator; the consignees' lien for their general balance against the intestate did not attach to them; and therefore the consignees must account for them to the administrator for the full amount, and their claim against the estate will be increased accordingly by withdrawing that credit.

MOSES SMITH *vs.* NELSON ROBINSON.

Though a writ, in which the damages are laid at more than seventy dollars, is served by a constable, who has no authority to serve it, yet if the defendant enters his appearance generally, and does not except to the service, at the return term, he waives the irregularity, and cannot subsequently take advantage of it.

THIS was an action of assumpsit. The writ was directed to the sheriff of the county of Worcester, or his deputy, or

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the constable or constables of Hardwick." The *ad damnum* was eighty six dollars; and the writ was served by a constable of the town of Hardwick, who, by the plaintiff's order, arrested the defendant.

The action was entered at the June term of the court of common pleas, in 1845, when the defendant appeared by counsel, and the action was continued, from term to term, until June term 1846, when the defendant filed a motion that the action be dismissed, because the writ had not been served upon him agreeably to the statutes of this Commonwealth. The court overruled the motion. The facts were entered upon the records of the proceedings of the court, and the action was continued till December term 1846; no objection to the overruling of the aforesaid motion being on file. At December term 1846, the action was tried, and a verdict was returned for the plaintiff. The defendant then excepted to the ruling of the court on the motion to dismiss the action.

E. Fuller, for the defendant. By the Rev. Sts. *c.* 15, § 71, a constable cannot serve a writ, in a personal action, in which the damages are laid at a greater sum than seventy dollars; and the only question is, whether the motion to dismiss was made seasonably. Delay to object to the service is not a waiver, where the officer had no authority to serve the process. *Hart* v. *Huckins*, 5 Mass. 260, and 6 Mass. 399. *Simonds* v. *Parker*, and *Kittridge* v. *Bancroft*, 1 Met. 508. *Carlisle* v. *Weston*, 21 Pick. 535.

Chapin, for the plaintiff. The defendant, by appearing, without objection, waived the irregularity of the service. 3 Chit. Gen. Pract. 525. *Ripley* v. *Warren*, 2 Pick. 592. The court has jurisdiction, when there is an actual, though not a legal service, if the defendant appears. See *City of Lowell* v. *Parker*, 10 Met. 309. *Prescott* v. *Tufts*, 7 Mass. 209.

Dewey, J. The present is one of those objections that are cured by a general appearance. The only object of the service of the writ by a proper officer is, to bring the party into court; and if he voluntarily comes in and enters his appearance as a party on the record, any defect in the service is

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cured. It would be otherwise if the defendant had come in specially, saving to himself all advantages, and for the alleged purpose of taking advantage of the defect of service. *Knox* v. *Summers*, 3 Cranch, 496. *Pearson* v. *Rawlings*, 1 East, 77. *Fox* v. *Money*, 1 Bos. & Pul. 250. *Fletcher* v. *Wells*, 6 Taunt. 191. *Rawes* v. *Knight*, 7 Moore, 461.

In the present case, not only was there a general appearance entered at the first term, but a continuance of the case and further appearance from term to term to the fourth term, when, for the first time, the objection was raised of a defective service of the writ.

The case differs essentially from those where there is a want of jurisdiction of the subject of the suit. In such cases, neither appearance nor direct consent of parties would give jurisdiction; and a motion to dismiss may be sustained at any stage of the proceedings. But if the court have jurisdiction of the subject, and the only alleged defect is that of want of jurisdiction of the person, that may be cured by a general appearance. *Exceptions overruled.*

JAMES S. WALL *vs.* GEORGE S. LAKIN & another.
THE SAME *vs.* CHARLES CHOATE & another.

The provision in St. 1841, c. 124, § 3, that the assignee of an insolvent debtor, in certain cases, may recover, from a creditor of such debtor, the property, or the full value of any property, assigned, sold, transferred or conveyed to the creditor by such debtor, with intent to give a preference to the creditor, does not extend to money paid by such debtor, though paid with intent to prefer the creditor: Money paid by such debtor, with such intent, cannot be recovered back by his assignee, by virtue of said statute, although the creditor, when he received the money, also purchased goods of such debtor, knowing him to be insolvent.

THESE were actions of assumpsit for money had and received of Jacob Anthony, by the defendants, to the plaintiff's use. Trial before *Dewey*, J. whose report thereof was as follows:

In the *first* of these cases, the plaintiff proposed to show that said Jacob Anthony, who had resided many years at

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Northampton, in the county of Hampshire, left the Commonwealth in February 1846, and went to Utica in the State of New York, carrying with him a considerable amount of money, and also a large quantity of goods, consisting of boots and shoes; that he left secretly, and with intent to defraud his creditors; that he was, at that time, insolvent, or in contemplation of insolvency; that the defendants, being his creditors, went in pursuit of him, in April 1846, found him at or near said Utica, demanded of him payment of their debt, and that he thereupon paid them $800 in money, in discharge of said debt.

The plaintiff offered further to show, that the defendants, when they received said $800, had reasonable cause to believe that said Anthony was insolvent; that on the 8th of April 1846, a creditor of said Anthony applied to a master in chancery, in the county of Hampshire, for a warrant against said Anthony's estate, under the insolvent laws, and that a warrant was issued accordingly, and the plaintiff legally chosen assignee of said estate.

The plaintiff insisted that, upon proof of the foregoing facts, he would be entitled, by virtue of *St.* 1841, *c.* 124, § 3, to recover of the defendants the money received by them as above stated.

The defendants (denying that said Anthony was in fact insolvent, or that they had reasonable cause to believe him to be so, when they received said payment,) contended that this action could not be maintained, if the facts offered to be proved were established. "1st. Because a payment of money to the defendants, which was received by them in payment of a debt due them, was not a case within that clause of *St.* 1841, *c.* 124, § 3, authorizing assignees of an insolvent debtor to recover the value of property transferred, or the property transferred, in the hands of a preferred creditor. 2d. Because the receipt of money from an absconding debtor, in the State of New York, by a creditor thus pursuing him, and obtaining the money from him, in payment of a debt, was not a case within the provisions of the statute aforesaid."

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The plaintiff offered no evidence with a view to maintain the action upon *St.* 1838, *c.* 163, § 10, and did not contend that he was entitled to recover by the provisions of that statute.

The judge proposed to rule in favor of the defendants, upon their first ground of defence above stated, and the case was then taken from the jury, by consent, under an agreement that the plaintiff should be nonsuit, if, in the opinion of the whole court, the defence could be sustained upon either ground taken by the defendants, supposing all the facts proved which the plaintiff offered to prove; otherwise, that a new trial should be granted.

In the *second* of these cases, the payment of the money was admitted by the defendants, and under the same circumstances as were alleged by the plaintiff in the preceding case. The only additional fact proposed to be proved in this case was, that the defendants, at the same time when they received the money sought to be recovered in this action, received, by way of purchase, a quantity of boots and shoes, the price of which was allowed by them in payment of a debt due from said Anthony to them.

This case also was taken from the jury, under an agreement similar to that above mentioned in the first of these cases.

B. F. Thomas, for the plaintiff.

C. Allen, for the defendants.

Dewey, J. By the principles of the common law, a payment made by an insolvent debtor to his creditor might legally be received and retained, although, at the time of receiving such payment, the creditor had reason to believe the debtor insolvent and unable to pay all his debts. Such payment could not be recalled for the purpose of restoring the amount thus paid to the general fund for distribution among all the creditors. It is incumbent upon the plaintiff, therefore, if he would sustain the present actions, to establish his right to reclaim the money, paid to the defendants, by some statute enactment. The *St.* of 1838, *c.* 163, it is conceded by the plaintiff's counsel, does not embrace the present case; the facts here found being wholly insufficient to bring the case

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within the provisions of the 10th section of that statute. To do so, it would be necessary to show that the payment was made by the debtor in contemplation of becoming an insolvent debtor, and of obtaining a discharge under the provisions of that act. *Gorham* v. *Stearns*, 1 Met. 366. That section does, in direct terms, embrace the case of payment of a debt with a view of giving a preference to a creditor; and if the other fact, required by that section, had existed, viz. that the payment, with a view to a preference, was made in contemplation of obtaining a discharge under that act, the present actions might have been sustained.

If any statute provision exists, authorizing the maintenance of these actions, it must be found in *St.* 1841, *c.* 124, § 3. This statute introduced some material modifications of the *St.* of 1838, *c.* 163. It enlarged the provisions of that statute, so as to extend the same to any applicant whose debts exceeded two hundred dollars. It further declared (§ 3) that the debtor should not be entitled to a discharge "if, within six months before the filing of the petition by or against him," "being insolvent or in contemplation of insolvency, he shall make any assignment, sale, transfer, or conveyance, either absolute or conditional, of any part of his estate, real or personal, intending to give a preference to a preëxisting creditor, or to any person who is or may be liable as indorser or surety for such debtor, unless said debtor shall make it appear that, at the time of making such preference, he had reasonable cause to believe himself solvent; and all preferences, so made or intended to be made, shall, as to the other creditors, be void; and the assignees may recover the full value of the property so transferred, or the property itself, from the creditor so preferred, provided the creditor, when accepting such preference, had reasonable cause to believe such debtor was insolvent." This section materially modifies the former statute as to the necessity of showing that the debtor, at the time of making the preference, had in contemplation the purpose of obtaining his discharge under the insolvent law. Actual insolvency, the creditor having reasonable cause to believe the

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debtor insolvent, is sufficient to authorize the assignee to recover the property transferred by way of preference. But the further inquiry is as to the cases embraced within the provisions of this third section. Does it embrace the case of a payment, in money, of a debt due to a creditor? Upon an examination, there will be found, in *St.* 1841, *c.* 124, no provision declaring the payment of a debt by an insolvent, in money, to be illegal, or authorizing an action by the assignee against such creditor to recover back the same, for distribution among all the creditors. Either designedly, or otherwise, the case of such payment of a debt is wholly omitted in this statute. It was introduced into the *St.* 1838, *c.* 163, § 10, by direct words, and such payment of money, if made in contravention of that statute, was recoverable by the assignee.

In framing the *St.* of 1841, *c.* 124, the previous *St.* of 1838, *c.* 163, must have been fully known and understood. Indeed, to a great extent, it would seem to have been copied, in its language, in *St.* 1841, *c.* 124; but the clause found in *St.* 1838, as to "payments" by an insolvent debtor, is wholly omitted in the statute of 1841, and, under the circumstances of the case, we must suppose designedly omitted, as one of the cases which would authorize a recovery by the assignee, under that act; leaving in force the right to recover back money paid by an insolvent debtor in contemplation of insolvency, and obtaining a discharge under the act of 1838, if the creditor receiving such payment knows the purpose of the debtor.

It was strongly urged upon us, at the argument, that it was against the whole policy of the insolvent laws thus to allow a payment to an individual creditor to be retained by him to his own use. If we look merely at the principle of equitable distribution of the whole assets among all the creditors *pro rata*, it would seem to be in derogation of that principle. But there are other considerations favoring the construction we have given. A different rule might be found to operate with great practical inconvenience in its application to payments made in the usual course of business. Many cases occur, of

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traders and other persons, who do business, while there is a strong public impression, that if their debts were at once all demanded, there might not be assets sufficient to pay them; yet who continue to pay such debts as are most strongly pressed, hoping to survive their embarrassment, and by better success in business eventually to discharge their entire indebtedness. Whether it would be sound policy to disturb such payments may certainly be somewhat questionable.

We, however, place our decision, in the present case, upon the ground that the case of payment, in money, of an existing debt, by an insolvent debtor, is not among the cases embraced within the provisions of § 3 of *St.* 1841, *c.* 124. There is, therefore, no statute provision which will authorize us to sustain the present action.

Upon the other point raised in the defence, that all the acts done by the defendants were done in the State of New York, and therefore not to be affected by our statutes, we give no opinion.

In the *second* of these cases, there is a fact not existing in the first, namely, that the defendants, when they received money in part payment of an existing debt, also purchased a quantity of shoes, the price of which was allowed by them in further payment of their debt. This fact can have no tendency to charge the defendants in this action, which is instituted solely to recover the money paid by the debtor to them on account of his indebtedness.

Plaintiff nonsuit in both cases.

EBENEZER E. ABBOTT *vs.* TIMOTHY N. UPHAM.

A mortgagee of land and a mill thereon, who enters on the mortgaged premises, and causes the tenant thereof, who is in possession under a parol lease from the mortgagor, to attorn, is an occupant of the mill, within the meaning of the Rev. Sts. *c.* 116, § 24, which give an action "against the person who shall own or occupy the mill at the time the action is brought," to recover annual or gross

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damages awarded to the plaintiff for the flowing of his lands by the dam of the mill, although such mortgagee does not enter upon the premises for the purpose of foreclosing the mortgage.

THIS was an action of debt, brought to recover the gross damages awarded to the plaintiff, by a jury, against Nahum Howe, on a complaint preferred against said Howe, by the plaintiff, under the Rev. Sts. c. 116, which prescribe proceedings for the support and regulation of mills. The action was founded on § 24 of said chapter, which provides that when a person, whose land is flowed by a mill dam, has obtained a verdict for the annual or gross damages caused thereby, he "may maintain an action of assumpsit or debt therefor, in the court of common pleas, against the person who shall own or occupy the mill when the action is brought."

At the trial in the court of common pleas, before *Merrick*, J. the plaintiff gave evidence that the defendant held a mortgage of the mill, (the dam of which caused the flowing of the plaintiff's land,) given by said Nahum Howe before the filing of the original complaint, on which the plaintiff obtained an award of damages as above mentioned. The plaintiff also gave evidence tending to show that the defendant was in the actual occupation of the premises on which the mill stood, or part thereof, some time before the commencement of this action; and also that the defendant, as mortgagee, had entered on the premises, and leased them, by parol, at a stipulated rent, to tenants, who were in, under such leases, when this action was commenced; also evidence tending to show that the defendant entered upon the premises, or a part thereof, being in the actual occupation of the tenants of the mortgagor, who were in under parol leases, and caused said tenants to attorn to him and pay rent to him; and that he was in the receipt of such rent, when this action was brought.

Upon this evidence, the judge instructed the jury, "that if they should find that the defendant, as mortgagee, had entered into and taken possession of the premises, and had leased them to tenants at a stipulated rent, and they had entered and enjoyed the premises under such leases; or if they should find

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that, the premises being in the actual possession of the tenants of the mortgagor, the defendant entered thereon, as mortgagee, and caused such tenants to attorn to him, and they agreed to pay their rent to him; the defendant must be held to be the occupant of the estate, and liable, as such, to the provisions of § 24 of *c.* 116 of the Rev. Sts. although he was not in possession for the purpose of foreclosing the right in equity of redemption, for breach of the condition of the mortgage."

The jury found a verdict for the plaintiff, and the defendant alleged exceptions to the aforesaid instructions.

Barton & Bacon, for the defendant, objected to so much only of the instructions as related to the effect of the defendant's causing the tenants of the mortgagor to attorn to him.

N. Wood, for the plaintiff.

Dewey, J. The right to recover the gross damages awarded by a jury, upon a complaint for flowing land, and the persons liable to such action, are questions that must be settled by the provisions of Rev. Sts. *c.* 116, containing the various statute enactments respecting the erection of mills. Whether it be reasonable that gross damages should be recoverable of a temporary occupant of a mill, and whether injustice may not sometimes be done by permitting such recovery of a tenant for a short term, are questions not within our province to decide. The legislature has plainly authorized such recovery of an occupant of the mill, and the sole inquiry is, whether the instructions of the presiding judge, as to the facts necessary to constitute the defendant such occupant, were correct in point of law. And it seems to us, that the instructions upon this point were entirely correct.

Without attempting to define the term "occupant," or to state, with precision, what might constitute such occupancy as would bring a party within the purview of this statute, we are clearly of opinion that when a mortgagee makes an entry under his mortgage title, upon the premises, and demands of the tenant, holding by parol lease from the mortgagor, to attorn to him, and the tenant assents to such demand, such entry and attornment are quite sufficient to make the mortgagee

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the occupant of the mill, within the provisions of the statute. It is to be borne in mind, that the leases to the tenants were by parol.

To charge the defendant, it is not necessary that the entry should have been made by him for the purpose of foreclosing the mortgage. Having the legal estate and the right of entry, he might make an entry; and if assented to by those having the possession, or peaceably acquired by him, it would have the effect to transfer to him the possession, although, without further proceedings, it would be unavailing as an entry to foreclose. *Exceptions overruled.*

ALMOND BREWER *vs.* SUMNER SIBLEY.

An objection to a writ, that it has not a proper seal, is waived, if not taken at the first term of the defendant's appearance. So of an objection to a writ, that the defendant is summoned "to answer to A. B. or his authorized attorney, C. D."

If objections to the mere form of an original writ can be taken by a defendant, on a writ of review sued out by him after he has been defaulted by mistake at the return term of the original writ, they must be taken at the return term of the writ of review, or they are waived.

Whether objections to the mere form of an original writ can be taken on a writ of review, *quære.*

THIS was a writ of review, brought by the defendant The original action was assumpsit on an account annexed to the writ, and was commenced in the court of common pleas. The original writ bore the seal of the supreme judicial court, and was made returnable to the court of common pleas, at the March term 1845, when and where the defendant was summoned, "to answer to Almond Brewer of Hardwick, or his authorized attorney, Hoffield Gould." The writ was duly served on the defendant, and was entered in said court at the return term, when the defendant was defaulted. At the June term of said court, in 1845, the defendant petitioned for a review or new trial, because he had been defaulted by mistake of his counsel. At a subsequent term, said court ordered a review of said action, and a writ of review issued, dated

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February 23d 1846, returnable at the following June term of said court, at which term it was duly entered by the defendant, and was thence continued, from term to term, until December term 1846, when the defendant, after he had moved the court for an indorser of the original writ, filed a motion that the plaintiff's action might be dismissed, "because there is no sufficient writ issuing out of the office of the clerk of this court, as the law requires, as appears of record; and also because there is no sufficient description of the parties to said action, as appears of record."

The court dismissed the action, and the plaintiff alleged exceptions.

Newton, for the plaintiff.

W. A. Bryant, for the defendant.

Dewey, J. The omission to affix a proper seal to a writ issuing from this court, is such error as will abate the writ, if the objection be properly taken. *Hall* v. *Jones*, 9 Pick. 446. But such objection must be taken at the first term of the appearance of the defendant. Although a seal is one of the requisites of a proper writ, yet the want of it will furnish no cause for a motion in arrest of judgment. *Foot* v. *Knowles*, 4 Met. 386. It is a mere defect in form, which, if relied upon, must be taken in due season; and if not thus taken, the exception is waived.

Assuming that objections of form were open to the defendant upon a writ of review, the present objection ought to have been taken at the return term of the writ of review, and not postponed to the third term. Taking the case in the most favorable view for the defendant, we think his motion to dismiss, for want of a proper seal, ought not to have been allowed.

The other ground for dismissal is also an objection to the form of the writ. The allegation that the defendant was summoned to answer to Almond Brewer, "or his authorized attorney, Hoffield Gould," was certainly a very irregular mode of stating the party plaintiff. But these last words may, we think, be treated as surplusage, and the proceeding be

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considered as instituted solely in the name of Almond Brewer. It was so treated by the defendant, in his petition for a review But if otherwise, yet the objection was too late. *Simonds* v. *Parker*, 1 Met. 508. *Carpenter* v. *Aldrich*, 3 Met. 58.

We have also doubts whether, upon a writ of review, any merely formal objections to the original writ are open to the party suing out such writ of review. If authorized only by an application to the court, as would be the more ordinary course, and as was the case here, the foundation for the application for a review would be, that the party had a substantial defence, upon the merits, of which he had been deprived by some casualty. It would seem to be quite reasonable, in such case, to restrict the defence to the merits, and not allow the party to quash the writ for defects of form. But, without expressing a more decided opinion upon this latter point, we think the motion to dismiss ought not to have prevailed. The exceptions are sustained, and the case is to be remitted to the court of common pleas.

BENAIAH MORSE *vs.* SILAS GODDARD.

If a lessee, to prevent being actually expelled from the demised premises, yields the possession thereof, and attorns, in good faith, to one who has a title paramount to that of the lessee and his lessor, and also a right to immediate possession, this is equivalent to an actual ouster, and is a good defence to an action, brought by the lessor against the lessee, for rent.

THIS was an action of debt, brought to recover five dollars, the amount of one month's rent of a tenement. At the trial in the court of common pleas, before *Washburn*, J. on appeal from a justice of the peace, the plaintiff put into the case a lease, made by him to the defendant, dated January 6th 1846, of a certain tenement, for one year, reserving rent in monthly payments, and stated that the action was brought for the rent of the month ending April 6th 1846. The defendant admitted that he entered into the tenement, under the lease

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and that he was still in possession. But he proposed to show, in defence, that in February 1846, W. M. Benedict and P. Merrick, being the owners of the tenement, entered into the same, and required the defendant to pay rent to them, and that he, in order to prevent being expelled therefrom, agreed to pay rent to them, after that time. The plaintiff objected to the competency of such evidence; but the court ruled that it was admissible. Thereupon the defendant introduced evidence tending to show that, on the 21st of February 1846, the attorney of said Benedict and Merrick (in company with two witnesses) met the plaintiff in the street, and informed him that he was going to take possession of that part of the house in which the defendant lived; that said attorney and two witnesses went to the house, and went into the part occupied by the defendant, and told him they had come to turn him out unless he would agree to attorn, and become the tenant of said Benedict and Merrick, and pay rent to them; that the defendant yielded, and agreed so to pay rent; that they went from the house, and found the plaintiff, and told him what had been done, and what the defendant had agreed to do. It did not appear that any evidence was shown to the defendant, at that time, of any title in Benedict and Merrick. In order to prove their title at the trial, the defendant introduced sundry deeds, and other evidence. [See *Benedict* v. *Morse*, 10 Met. 223.]

The judge instructed the jury, that if the defendant *bona fide* yielded possession of the premises to Benedict and Merrick, to prevent being actually expelled, and the plaintiff then had notice of this; and if the defendant had satisfactorily proved that Benedict and Merrick owned the estate by a good title, and had a right to take immediate possession, at the time when they undertook to turn the defendant out of possession — their title and possession being adverse to those of the defendant and his lessor — such yielding of possession was equivalent to an actual ouster, and was competent evidence in defence to the plaintiff's claim, sued in this action, for rent accruing after such yielding of possession; the burden of proof being upon the defendant.

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The jury returned a verdict for the defendant, and the plaintiff excepted to the judge's instructions.

Bridges, for the plaintiff, cited 1 Phil. Ev. (8th ed.) 342, *note* (2). *Doe* v. *Smythe*, 4 M. & S. 347. *Cobb* v. *Arnold*, 8 Met. 398. *Pendleton* v. *Dyett*, 4 Cow. 581. *Doe* v. *Mills*, 2 Adolph. & Ellis, 17. 2 Leigh's Nisi Prius, 723.

Randall & Hartshorn, for the defendant, were stopped by the court.

SHAW, C. J. In a justice action of debt for a month's rent, the defence was, that the defendant had been ousted, by persons having a paramount title, before the commencement of the time for which the rent was claimed.

The defendant offered evidence to show, that persons having a valid title, paramount to that of the defendant and his lessor, the plaintiff, and having an immediate right of entry, and of possession under it, made an actual entry on the premises, and required the defendant to pay rent to them from the time of such entry, or quit the premises. But it is objected to this defence, that a tenant cannot contest the title of his lessor, nor set up a paramount adverse title in a third person And we think it well settled, that a lessee, taking the estate of his lessor, and entering into possession under it, admits his title, and is estopped from denying that title; or, what is in effect the same thing, is estopped from setting up an outstanding title in a third person. *Doe* v. *Smythe*, 4 M. & S. 347. *Doe* v. *Mills*, 2 Adolph. & Ellis, 17. But this is not inconsistent with another rule, that where there is an eviction or ouster of the lessee, by a title paramount, which he cannot resist, it is a good bar to the demand for rent, on the plain ground of equity, that the enjoyment of the estate is the consideration for the covenant to pay rent, and when the lessee is deprived of the benefit, he cannot be held to pay the compensation. Bac. Ab. Rent, L. Cruise's Dig. tit. 28, *c.* 3. It is not enough, therefore, that a third party has a paramount title; but, to excuse the payment of rent, the defendant must have been ousted or evicted, under that title. *Hunt* v. *Cope* Cowp. 242. *Pendleton* v. *Dyett*, 4 Cow. 581.

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But an eviction under a judgment of law is not necessary. An actual entry, by one having a paramount title and present right of entry, is an ouster of the tenant. He cannot lawfully hold against the title of such party. He is not bound to hold unlawfully, and subject himself to an action, and is not, therefore, compellable to resist such entry. *Hamilton* v. *Cutts*, 4 Mass. 349. So, when an execution creditor is put into possession by the sheriff, under the levy of an execution, he has the actual and exclusive possession, and may maintain trespass. *Gore* v. *Brazier*, 3 Mass. 523.

There is a recent case, which seems to us alike in principle. *Smith* v. *Shepard*, 15 Pick. 147. A mortgagor in possession made a lease for years, reserving rent. Afterwards, the mortgagee, having a paramount title, entered, as he lawfully might, with right to take the rents and profits. In a suit by lessor against lessee for rent, such entry under a paramount title was held to be an ouster, and a good bar to the action.

It is to be understood, that when a tenant thus relies on an ouster *in pais*, without judgment, he has the burden of proving the validity of the elder title, the actual entry under it, and that he acted in good faith, and without collusion with the party entering.

The instruction to the jury was, that if the defendant, *bona fide*, had yielded possession of the premises to Benedict and Merrick, to prevent being actually expelled; that the plaintiff had notice of this; and that, upon the evidence, Benedict and Merrick had a good title, paramount to that of the defendant and his lessor, and the right of immediate possession; their entry was equivalent to an actual ouster, and was a good defence to the action for rent. This direction, we think, was right; and the jury, by returning a verdict for the defendant, affirmed these facts. *Exceptions overruled.*

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WILLIAM M. BENEDICT & another *vs.* THANIEL CUTTING.

C. and M. entered into a recognisance before a justice of the peace, the condition of which was, that M. should enter, in the next court of common pleas, the action of A. and B., brought before said justice, to eject M. from certain premises described in the complaint in said action, and transferred by said justice, at M.'s request, to said court — the title to said premises being brought in question by M. — and should pay all rents then due to said A. and B. for the use and occupation, by M., of said premises, and all intervening rent, damages and costs, and should do and receive that which said court should enjoin upon him: M. entered said action, according to said condition, and prosecuted it to final judgment against him: and an execution, issued against him for the costs of the suit, was returned unsatisfied: The justice did not return the recognisance to the next court of common pleas, with the other papers in the case, and it was not filed in the clerk's office till after said final judgment: After it was filed in the clerk's office, A. and B. brought an action of debt on it against C., in the court of common pleas. *Held*, that the recognisance was a record of that court, within the meaning of the law, though not extended on the book of records; that it sufficiently showed, on its face, the cause of its caption, and the jurisdiction of the justice; and that A. and B. were entitled to recover of C. the rent due to them from M. at the date of the recognisance, and all intervening rent, and the costs of the aforesaid action.

THIS was an action of debt on the following recognizance. "Memorandum. Worcester ss. At a justice court held before the subscriber, this 13th day of April, A. D. 1844, personally appeared Benaiah Morse of Millbury, in said county, as principal, and Thaniel Cutting and Leonard Hill, of the same Millbury, and acknowledged themselves to be severally indebted unto William M. Benedict of said Millbury, and Pliny Merrick of Worcester, in said county, in the sum of three hundred dollars, to be levied," &c. "The condition of the recognizance is such, that if the said Morse shall enter, at the court of common pleas, next to be holden at Worcester, on the third Monday of June next, the action of said Benedict and Merrick against him, brought before me, to eject the said Morse from certain premises described in the complaint in sai action, this day heard and transferred, at the request of saia Morse, the defendant, by me, to the said court of common pleas, (the title to said premises being brought in question by said defendant,) and also shall pay all rents now due to said Benedict and Merrick, for the use and occupation, by him, of said premises, and all intervening rent, damages and costs, and

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shall do and receive that which said court shall enjoin upon him, the said Morse, then this recognizance to be void; otherwise, to remain in full power, force, and virtue. Elias Forbes, Justice of the Peace."

The declaration was as follows: "For that one Benaiah Morse, as principal, and Leonard Hill and said Cutting, as sureties, at a justice's court held at said Millbury, by Elias Forbes, Esquire, then and ever since a justice of the peace, in and for said county of Worcester, duly authorized by law to take recognizances, personally appeared before said justice, and, by their recognizance, acknowledged themselves to be severally indebted unto the plaintiffs, in the sum of three hundred dollars; it being upon a complaint made by the plaintiffs, against said Morse, that he was in possession of certain real estate belonging to the plaintiffs, against law, and against the right of the plaintiffs; the title to which said real estate the said Morse, by his plea, brought in question; and at his request the case was transferred to the court of common pleas, next to be holden at Worcester, in said county, on the third Monday of June then next ensuing, having jurisdiction of the subject matter of the cause. The condition of the said recognizance was, that said Morse should enter, at the said court of common pleas, the said action of said plaintiffs against him, and should pay all rents then due to said plaintiffs for the use and occupation, by him, of said premises, and all intervening rent, damages and costs, and do and receive all that said court should enjoin upon him, said Morse. Which said sum of three hundred dollars was adjudged by said justice to be a reasonable sum. And the said recognizance was returned to the said court of common pleas, according to law. And the plaintiffs aver that said complaint was entered in said court of common pleas, there heard and tried, and a verdict rendered for possession of said real estate in favor of the plaintiffs, and that exceptions were taken, by the said Morse, to the rulings and directions of the presiding judge, in the trial of said complaint, which said exceptions were argued, and determined and overruled, at the last September term (1845) of

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the supreme judicial court, in and for said county of Worcester, and judgment rendered upon the said verdict,* for the possession of said estate, and costs of court, taxed at sixty two dollars and forty six cents. Execution issued on the twenty first day of February last past, (1846,) and is returned into said court, wholly unsatisfied for said costs. And the plaintiffs aver that neither the defendant nor said Morse, nor said Hill, has ever paid said costs. And the plaintiffs aver that neither the said Morse nor the said Cutting or Hill has paid the said rent due and in arrear, and all intervening rent, damages and costs, but they have wholly neglected the same; and by reason of such neglect, the defendant has broken the condition of his recognizance as aforesaid; which said recognizance is in full force and unsatisfied, as by the record thereof, with said justice, and in the said court of common pleas, will fully appear. Whereby an action hath accrued to the plaintiffs," &c.

At the trial in the court of common pleas, before *Washburn*, J. the plaintiffs offered in evidence the foregoing paper, purporting to be the recognizance declared on. The defendant objected to its admission, on two grounds. *First*, that this recognizance had never become a matter of record of the court of common pleas. On this point, it was admitted that the copies, in the case referred to in the recognizance, were filed in the court of common pleas, to which the case was removed by the defendant in that action, (the principal in this recognizance,) and that the action was prosecuted to final judgment, as was set forth in the plaintiffs' declaration; that Forbes, the justice, did not send up the recognizance with the other papers in the case; and that it was never filed in the clerk's office of that court till March 3d 1846, just before the commencement of this action. The recognizance showed an indorsement by the clerk, that it was "filed March 3d 1846;" but there was no evidence that it had been spread upon the records of the court.

* See 10 Met. 228.

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Secondly, the defendant objected to the competency and validity of the recognizance, because it did not set forth sufficiently the cause of its caption.

The defendant objected to the plaintiffs' recovering any thing for rent in arrear, as claimed in their declaration, because the recognizance did not show that any rent was claimed by the plaintiffs in the original action, nor that the action was brought under the provisions of the 104th chapter of the revised statutes.

The plaintiffs thereupon produced a copy of the original complaint, (which was in the form allowed by the Rev. Sts. c. 104, § 4,) and also produced a copy of the record of the justice's proceedings on said complaint, and offered them in evidence to show, among other things, the form and nature of the original action, and that the plaintiffs therein claimed rent, upon the hearing before the justice.

The defendant also objected to the plaintiffs' right to recover, in this action, the costs recovered in the original action.

The judge admitted the recognizance, the copy of the original complaint, and the copy of the record of the justice's judgment, and instructed the jury that the plaintiffs had a right to recover the rent claimed in their declaration, and the costs of the former suit. The jury returned a verdict for the plaintiffs accordingly, and the defendant alleged exceptions.

Bridges, for the defendant. The recognizance must stand or fall by itself, and cannot be helped *aliunde*. The cause of its caption must fully appear upon its face, so that the jurisdiction of the magistrate may appear. *Commonwealth* v. *Downey*, 9 Mass. 520. *Commonwealth* v. *Daggett*, 16 Mass. 447. *Bridge* v. *Ford*, 7 Mass. 209. In the present case, the magistrate's jurisdiction does not appear on the recognizance, but only in the declaration.

The declaration must be on a record of the court; *Bridge* v. *Ford*, 4 Mass. 641; and the record should be full, before the declaration is made. See *Commonwealth* v. *M'Neill*, 19 Pick. 136. *Commonwealth* v. *Bail of Gordon*, 15 Pick. 193. The recognizance, in the present case, is not declared on as a

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record of the court of common pleas, but as a record with the justice and in the court of common pleas. There is, indeed, an averment that the recognizance was returned to the court of common pleas according to law; but the evidence disproved this averment, and showed that it was not returned to the court until after the cause in which it was taken was at an end. See 19 Pick. *ubi sup.* *Bartholomew* v. *Chapin*, 10 Met. 1. *Commonwealth* v. *Baird*, 9 Met. 407.

The recognizance does not show that there was any rent in arrear, though the declaration alleges it.

Randall & Hartshorn, for the plaintiffs. The recognizance is sufficient, in itself, although not so full as it might have been. It shows the cause of its caption, namely, that a complaint was pending against Morse, in which title to real estate came in question, and that he requested a transfer of the case to the court of common pleas. The cause of taking the recognizance is therein set forth as fully as in *Bartholomew* v. *Chapin*, or in *Commonwealth* v. *M'Neill.*

The magistrate might have been subjected to a fine, for not returning the recognizance at the first term; *Ex parte Neal*, 14 Mass. 205; but his neglect cannot deprive the plaintiffs of their rights. Papers on file, in a case, are records, though not put on file so soon as they ought to be, and though not extended on the clerk's book of records. *Pruden* v. *Alden*, 23 Pick. 184.

Shaw, C. J. Debt upon a recognizance, entered into by the defendant and two others, before a justice of the peace, conditioned to enter a case then pending before said justice, and removed to the next court of common pleas, at the request of the defendant; the title to real estate having been brought in question. It was described, in said condition, to be an action of said Benedict and Merrick against Benaiah Morse, brought before said justice, "to eject the said Morse from certain premises described in the complaint in said action," and further conditioned to pay all rents then due to said Benedict and Merrick, and all intervening rent, damages and costs, and to do and receive, &c. At the trial, several objections were

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taken by the defendant, which, being overruled, are now brought up by a bill of exceptions.

1. It was objected that this recognizance had never become a record of the court of common pleas. This appears to us to be founded in a mistaken view of the course of practice in such cases, and is not warranted by the facts as they appear on the record. The case, in which this recognizance was taken, was seasonably entered in the court of common pleas, by the clerk, by placing the title of the cause on his docket. It was the duty of the defendant to enter the case at that court, and he did so; and this necessarily carried with it all the papers from the justice's court necessary to the prosecution of the cause, and of course it included the recognizance. If the file of papers was not actually delivered, at that time, to the clerk of the court, they were subject to the control of the court, and might be ordered in at any time, and, when actually filed, would be considered as filed *nunc pro tunc*. The papers, when so filed, are part of the record, within the meaning of the law. It is not necessary that matters should be entered at large on the books of the court, to be a record. The dockets and files constitute the record, until it can be made up in form, by the proper recording officer. *Pruden* v. *Alden*, 23 Pick. 184. The entry of the action in the common pleas carries with it all the papers, including the recognizance, returnable to that court, and they become a record of that court. The papers may be brought in for use, when wanted for use, as in other cases, where the common practice is for the attorney of the appellant to keep the custody of the copies, until the trial, or until wanted for use.

2. It is further objected that it does not appear that the proceeding before the magistrate was a proceeding under the landlord and tenant act, viz. Rev. Sts. c. 104. In ordinary cases, founded on a general statute, it is not necessary to cite the statute, or refer to it in terms; it is sufficient to state such facts and such a case as falls clearly under the statute. But *a fortiori* is it not necessary under this statute; because the statute itself, § 4, prescribes a simple form of proceeding It

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provides that the plaintiff may take, from a justice of the peace, a writ in the form used for an original summons, summoning the defendant to answer the plaintiff, "for that the defendant is in possession of the lands or tenements in question, which he holds unlawfully and against the right of the plaintiff; and no other declaration shall be required." Here the case is described as an action, brought before a justice of the peace by the present plaintiffs against the defendant, to eject him from certain premises. This describes, in language sufficiently intelligible, a proceeding under Rev. Sts. c. 104, and shows that the magistrate had jurisdiction and authority to take the recognizance.

The case of *Commonwealth* v. *Baird*, 9 Met. 407, was cited as an authority for the defendant. In that case, the recognizance was not returned to the court, before which the defendant was bound to appear, and therefore never became a record of that court. No *scire facias* would lie on it in the court of common pleas, because it was not returnable to that court, and had not become a record of that court, by appeal or otherwise, and could not so become, because not returned to the court or magistrate before whom the party bailed was bound to appear. In the case at bar, the recognizance was returnable to the court of common pleas, is in fact returned there, and become a record of that court.

Exceptions overruled.

ROYAL TAFT *vs.* ANANIAS GIFFORD & another.

D., as principal, and G., as surety, gave a joint note to T. in March 1841, payable in April 1842: In April 1843, T. demised a farm to D. for one year, by a written lease, which contained a provision that the produce and profits of the farm should be holden for the payment (among other debts of D.) of the aforesaid note: T. took no measures to obtain the produce of the farm, but permitted D. to dispose of it, without objection; and G. had no knowledge of said provision in the lease, until after D. had disposed of said produce. *Held*, in a suit by T. on the note that his omission to obtain the produce of the farm and apply it to the payment or part payment of the note, did not discharge G. from his liability to pay the note in full.

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Taft v. Gifford & another.

Assumpsit on a joint and several note for $175, given to the plaintiff by Nelson Darling, as principal, and Ananias Gifford, as surety, dated March 8th 1841, and payable on the 1st of April 1842. The action was commenced in the court of common pleas, where Darling was defaulted, and Gifford made defence. At the trial, before *Washburn*, J. the defendant Gifford put into the case a lease made by the plaintiff to said Darling, dated April 8th 1843, demising to him, for one year from the first of said April, a farm in Uxbridge, and the buildings thereon, except certain rooms in one of the houses, &c. which the plaintiff reserved for his own use. The lease contained this clause: "Said lessee yielding and paying therefor, at the expiration of this lease, the sum of ninety five dollars; and the produce and profits of the farm are holden for the payment of two certain notes of hand, one for ninety five dollars, bearing even date with this indenture, signed by said Darling, and the other for one hundred and seventy five dollars, and dated March 8th 1841, signed by said Darling and Ananias Gifford," &c. (the note in suit.) "And said Darling is to board said Taft, at $1·75 per week, as long as said Taft boards in said Darling's family, towards the ninety five dollar note."

It was contended by the defendant Gifford, that the plaintiff, having by said lease taken security, on the produce of the farm, for the payment of the note in suit, had permitted the produce to be disposed of, to the injury of said defendant, who was a surety on the note, and had thereby discharged his liability.

There was evidence tending to show that Darling occupied the farm, under said lease, and that the plaintiff boarded with him; that Darling raised crops of considerable value, some part of which were carried from the farm, or were sold, by him; and that the plaintiff knew that this was done, and made no objection.

The case was submitted to the jury, upon the following (among other) instructions: "That if the plaintiff took the pledge or mortgage of the produce of the farm, after the

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note in suit was due and payable — unless it was known to the defendant, and he did something or omitted something in consequence of it — the defendant could not set up, in defence to this action, the fact that the plaintiff permitted Darling to carry off the produce without objection."

A verdict was returned for the plaintiff, for the full amount of the note; and, upon being questioned by the court, the jury stated that they found their verdict solely upon the ground that Gifford had no knowledge of the provisions of the lease, as to securing the note, until after the produce was disposed of by Darling.

The defendant Gifford alleged exceptions to the instructions given to the jury.

B. F. Thomas & Hartshorn, for Gifford. In equity, a surety is discharged by the principal's preventing him from having the benefit of collateral or other security. 1 Story on Eq. §§ 324–327, 477, 499–502, 638. *Copis* v. *Middleton*, Turn. & Russ. 229. *Belcher* v. *Hartford Bank*, 15 Connect. 381. *Hodgson* v. *Hodgson*, 2 Keen, 704. *Neimcewicz* v. *Gahn*, 3 Paige, 614. *American Bank* v. *Baker*, 4 Met. 175, and books there cited. *Hayes* v. *Ward*, 4 Johns. Ch. 130. *New London Bank* v. *Lee*, 11 Connect. 112. *Homer* v. *Savings Bank*, 7 Connect. 478. *Eastman* v. *Foster*, 8 Met. 19. *Law* v. *East India Co.* 4 Ves. 833.

The rule is the same at law. *Samuell* v. *Howarth*, 3 Meriv. 277. *Dunn* v. *Slee*, Holt N. P. 402. *Melvill* v. *Glendining*, 7 Taunt. 126. *Bardwell* v. *Lydall*, 5 Moore & Payne, 327, and 7 Bing. 489. *Baker* v. *Briggs*, 8 Pick. 122.

It is immaterial whether the surety knows of the security given to the principal; and therefore the instruction given to the jury, and upon which they found their verdict, was wrong.

In Sir Samuel Romilly's argument, in *Craythorne* v. *Swinburne*, 14 Ves. 162, he said, "a surety will be entitled to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety." And this doctrine was approved by Lord Eldon, in the decision made by him in that

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case, and in the case of *Mayhew* v. *Crickett*, 2 Swanst. 191. It was also approved by Lord Brougham, in *Hodgson* v. *Shaw*, 3 Myl. & K. 191.

Though the produce of the farm was not in existence when the hypothecation was made, yet the title to it passed, as between the parties. *Aliter*, perhaps, as to the creditors of Darling. *Butterfield* v. *Baker*, 5 Pick. 522. *Macomber* v *Parker*, 14 Pick. 497. *Lewis* v. *Lyman*, 22 Pick. 437. *Jones* v. *Richardson*, 10 Met. 481.

Chapin, for the plaintiff. This defence cannot be made to a joint action against both makers of the note. There cannot be two different judgments in such a case. *Baker* v. *Briggs*, 8 Pick. 128, 129. *Carpenter* v. *King*, 9 Met. 511, 517. Even in the case of a joint and several contract, this defence could not be maintained. Therefore a new trial should not be granted, even if the knowledge of the surety, that the plaintiff had obtained security by the provisions of the lease, was wrongly made, by the judge at the trial, an element in the decision.

The principles of the cases cited for the defendant may safely be admitted by the plaintiff; but the facts are, in none of them, like those in the case at bar. The lease, on which the defendant relies, was made more than two years after the note in suit was given, and about a year after it had fallen due; and the provision in it for securing the note was not made for the benefit of the defendant. *Halford* v. *Byron*, Pre. Ch. 178. It is doubtful, perhaps, whether the plaintiff could have obtained any advantage from that provision if he had attempted so to do. See *Wait, Appellant*, 7 Pick. 100. *Butterfield* v. *Baker*, 5 Pick. 522. But if he could, yet he was not bound, as between himself and the surety, to the use of active diligence in obtaining that advantage. 1 Story on Eq. § 326. See also *Heath* v. *Key*, 1 Younge & Jerv. 434. *Wallwyn* v. *Coutts*, 3 Meriv. 707.

Shaw, C. J. In this suit on a joint note, made by the two defendants, as principal and surety, the principal has been defaulted, and the surety defends. His defence is placed on

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the ground, that the plaintiff voluntarily relinquished a security which was given him by the principal, and from which the whole or a part of the amount of this note might have been realized; that, by a rule of equity, adopted as a rule of law, the defendant is discharged, in full or *pro tanto*. This security was supposed to arise from a promise in a lease of a farm, made by the plaintiff to Darling, the principal debtor on this note, by which it was stipulated that the produce and profits of the farm should be holden for the payment of two notes, one bearing even date with the lease, and the other, the note now in suit. There was a stipulation in the lease, that the lessor reserved certain apartments, in the house and stable, to his own use, with a right to board with the lessee, at a fixed rate per week. In all other respects, the possession of the demised premises passed by the lease, which was in the usual form, to the lessee. The plaintiff never took any of the produce into his own custody, nor received any of the profits, under this clause.

The court are of opinion, that the facts do not bring the case within the principle stated, even supposing — of which we give no opinion — that this would be a good defence, in a joint action, upon a joint note, against principal and surety. The plaintiff received nothing under this provision. It was a mere executory agreement, authorizing the plaintiff to take possession of the produce when it should come into existence; and if he had exercised that power, and taken such possession, before the right of any creditor or purchaser had intervened, it might have given him a lien. *Bartlett* v. *Williams*, 1 Pick. 288. But until possession taken, he had no lien, and could not hold the produce against a *bona fide* purchaser or attaching creditor. *Jones* v. *Richardson*, 10 Met. 481. And we think he was not bound to active diligence in availing himself of the power to obtain a lien, any more than the holder of a note, with a surety, is bound to active diligence in securing his note by attachment of the property of the principal, when he has an opportunity to do so. 1 Story on Eq. § 325. It was a collateral security, not given

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at the time the note was made, but afterwards, and not taken with the knowledge or for the use and benefit of the surety. It was a means of obtaining a pledge, at the option of the plaintiff, of which he might have availed himself or not, but it did not constitute an actual security. The plaintiff's forbearing to act upon this executory agreement, and taking no measures to enforce it, was not such a voluntary relinquishment of any pledge or security as to bring the case within the principle relied on by the defendant.

Exceptions overruled.

INHABITANTS OF OAKHAM *vs.* INHABITANTS OF SUTTON.

In an action against a town to recover for the support of a pauper whose settlement was once in that town, the burden of proving that he afterwards acquired a settlement in another town is on the defendants.

A person does not acquire a settlement in a town, under Rev. Sts. *c.* 45, § 1, clause 4th, by having an estate of inheritance or freehold in the town, and living on the same three years successively, if he receive support as a pauper, during those three years, from the town in which he had his settlement.

Support granted to a person, as a pauper, by the overseers of the poor of the town in which he has a settlement, will prevent his acquiring a settlement in another town in which he resides, although the act of the overseers, in granting such support, be not ratified by the town of whose poor they are overseers.

ASSUMPSIT to recover for supplies furnished by the plaintiffs to Lot Simpson, a pauper, whose settlement was alleged to be in Sutton. The only question raised at the trial in the court of common pleas, before *Washburn*, J. was, whether the pauper had acquired a settlement in the town of Douglas, by having and living upon a freehold estate there, three years successively; it being admitted that his settlement was in Sutton, unless he had so acquired a settlement in Douglas; and it being further admitted, that he owned and lived upon a freehold estate in Douglas long enough to gain a settlement thereby, were it not for certain alleged aid and assistance rendered to him, by the defendants, during that time. It appeared that this alleged aid was furnished on the 3d of May

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1842; and the evidence tended to show that it was furnished by means of an order for five dollars, drawn by Lewis Torrey upon one Holman, in favor of the pauper, payable in goods. It was admitted that Torrey was then one of the overseers of the poor of Sutton; but the order did not indicate that he drew it in that capacity, and Holman charged it to Torrey's private account. At the time when the pauper obtained the order from Torrey, Holman had an account open with the town of Sutton, in which were entered the orders of the overseers for supplies furnished to paupers; but nothing was then said, by either party, as to this order's being furnished on the credit of the town.

An order for five dollars was produced in evidence, dated December 12th 1842, drawn by the selectmen of Sutton, (who were admitted to be the overseers of the poor,) on the town treasurer, in favor of said Lewis Torrey, which the treasurer paid; and there was evidence tending to show that this order was drawn to repay Torrey the amount of the other order above mentioned.

A report of the overseers of the poor of Sutton for the year 1842, made to the town at a town meeting held in 1843, was put into the case, from which it appeared that they had entered the payment of five dollars to said Torrey on account of Lot Simpson. The only action of the town, on this report, was a vote to put it on file.

The defendants inquired of a witness, who was present at the town meeting aforesaid, what was done at said meeting, in reference to said report, and why it was done. But the judge ruled that the questions were incompetent. The defendants then inquired of the witness, whether it was not understood in Sutton, that when a vote is passed to put a report on file, in contradistinction to its being accepted, it is because there is something objectionable in it, which the town refuse to ratify. The judge ruled that the question was incompetent; and also ruled that the vote to put the report on file was not an acceptance of it. The defendants then asked the witness what was said and done at the town meeting

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aforesaid, respecting the support of Lot Simpson, and whether the matter was discussed. These questions also were ruled to be incompetent.

Four questions were argued, by the defendants' counsel, to the jury. 1st. At the time when Torrey furnished the order to Simpson, was Simpson a pauper, and had he fallen into distress? 2d. Did Simpson go to Torrey, claiming and intending to claim aid as a pauper? 3d. Did Torrey furnish the aid, with an intention of charging the same to the town, and not to Simpson? 4th. If Torrey furnished the aid to Simpson, as a pauper, was there any ratification of his act, by the board of overseers of the poor?

The judge instructed the jury, "that if the overseers drew the order of December 12th 1842, upon the town treasury, to repay Torrey, being one of the overseers of the poor, for aid furnished to Simpson, the burden of proof was on the defendants to explain this, and to show that it was not furnished by said overseers to him as one standing in need of relief, or not intended to be furnished by them as such overseers: And that if Simpson, being apparently in a condition to need immediate relief, applied to Torrey for such relief, and Torrey, being an overseer of the poor, and believing him to stand in need of it, furnished him with the relief required, it would have the effect of relief furnished to one standing in need, although he did not declare, at the time, that he made such application as a pauper; but if, when he made the application, he did not know that Torrey was an overseer of the poor, or did not intend to apply to him, as such, for relief, such relief would not affect the acquiring of a settlement in Douglas: That if Torrey furnished the order to Simpson, in the way of a gift or loan, solely on his (Torrey's) own account, without any expectation or intention of being remunerated by the town; or if he took a promise to himself, with a view of recovering the debt for his own use; then a subsequent payment to him of the sum so advanced by the overseers would not make such aid the furnishing of relief by the town, so as to affect Simpson's settlement: But if Torrey, being an

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overseer of the poor, furnished the relief, without being particularly authorized so to do by the other overseers, intending to apply to them to refund it, or expecting to be repaid by the town, and if the overseers, knowing the facts, gave him an order on the town for the repayment of the money, because, as an overseer, he had made the advance, it would be a ratification of his act, and would have the same effect upon Simpson's settlement, as if the aid had been originally furnished by the overseers, as a board: And if aid was furnished to Simpson, as a pauper, by the defendants, during his owning and occupying said freehold estate, it would prevent his acquiring a settlement by reason of such owning and occupancy."

The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions to the judge's rulings and instructions.

Barton, for the defendants.

B. F. Thomas, for the plaintiffs.

Shaw, C. J. The defendants having admitted the settlement of the pauper to be in their town, the presumption of law was, that the settlement continued till a new settlement was acquired; and they undertook to show that such new settlement had been acquired, by the pauper, in Douglas, by his owning a freehold in that town, and residing on it three years. The defendants, having thus taken upon them the affirmative, were bound to prove this case satisfactorily. Having proved such freehold and residence, this was *prima facie* evidence of settlement, but not conclusive.

It has been too frequently settled, to be now questioned, that where, by the statute, a settlement would be gained by a prescribed length of residence in a town, either as a freeholder living on his freehold, or as a resident paying taxes in five out of ten years, such settlement is not gained, if, during such esidence, the pauper receives support or relief from the town of his settlement. *Brewster* v. *Dennis*, 21 Pick. 233. *East Sudbury* v. *Waltham*, 13 Mass. 460. *East Sudbury* v. *Sudbury*, 12 Pick. 1. *West Newbury* v. *Bradford*, 3 Met. 428

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Taunton v. *Middleborough*, 12 Met. 35. It was, then, a question of fact for the jury; and some evidence having been offered, by a paid town order, to prove such relief furnished, we think the court was right in ruling that it was incumbent on the defendants to explain this by showing that it was not furnished to the pauper as one standing in need of relief; or that it was not furnished by the overseers in their said capacity. If furnished at all by Sutton, the town of his settlement, it prevented him from acquiring a settlement, by living on his freehold in Douglas. But, to have that effect, it must appear that he was relieved as a pauper.

The instructions regarding the doings of the town, whether the report was accepted or rejected, and whether parol evidence was admissible, and the effect of such evidence, may be laid out of the case, as wholly immaterial. If the town was bound, it was by the doings of the overseers, as officers vested by law with power to bind the town by acts done in pursuance of their authority and duty. Such acts need no ratification by the town, to make them binding on the town. Rev. Sts. *c.* 46, §§ 1, 2, 13, 26. *Belfast* v. *Leominster*, 1 Pick. 123.

Two general questions arise in the present case. 1st. Did Simpson, the pauper, apply for relief; that is, for the public charity provided by law for persons standing in need? 2d. Did the town, by their authorized officers, afford that relief? These questions were left to the jury, under instructions sufficiently favorable to the defendants, and the jury, upon the evidence, have found the affirmative to be true.

It was contended that the applicant for relief must be proved to have been in actual need of relief; and that apparent need was not sufficient. No facts appear which render this point material. But were it otherwise, all which could be required of officers would be vigilant inquiry and sound judgment in determining whether one obviously and apparently in need of relief is really so. Instances are not wanting, of persons living in alms-houses, or otherwise supported by public charity, on whom have been found considerable

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sums of money concealed amongst the rags which indicated the most squalid poverty. If overseers, who are bound by law to afford immediate relief to actual want, and who must act upon the evidence before them, are sometimes deceived by appearances, still their acts, done in good faith, must be deemed acts binding on the town.

Whether the act of an individual overseer, not afterwards sanctioned by others, is binding on the town, is a question that I am not aware has been expressly decided. Cases may be supposed, where it would seem to be necessary for one overseer to act promptly when the others could not be consulted; and it would seem, therefore, from the nature of the duty, that the act of one would be legal. It has been held that notice to one is sufficient; but that may go on the presumption that the one to whom it is given will communicate it to his associates. *Dalton* v. *Hinsdale*, 6 Mass. 501. *Walpole* v. *Hopkinton*, 4 Pick. 358. It is not necessary to decide this question, in the present case, because it appears that the act of Torrey, in furnishing relief, was adopted and sanctioned by his associates, by drawing an order on the town treasury for his reimbursement.

It is wholly immaterial to the present case, whether the overseers, in affording relief to Simpson, intended to fix, or change, or in any way affect, his settlement. That result is collateral to the act of furnishing relief, and does not depend on the intent with which it is done, but upon the provisions of law giving effect to it.

We think the instructions were sufficiently explicit, that in order to be considered as relief furnished by the town, it must appear that the order was given by Torrey, not as a gift or loan to the pauper, but as an advance, made by him as overseer, to be reimbursed by the town.

Exceptions overruled.

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Inhabitants of Webster *vs.* Inhab'tants of Uxbridge.

The provision in the Rev. Sts. *c.* 46, § 15, that "when any person shall be supported in any town, other than that in which he has his settlement, the town that is liable for his support shall not, in any case, be required to pay therefor more than at the rate of one dollar a week, provided the town that is liable for the support of the pauper shall cause him to be removed, within thirty days from the time of receiving legal notice that such support has been furnished," does not apply to the case of the removal of a pauper after his decease, though before burial.

This was an action of assumpsit to recover the amount of expenses incurred by the plaintiffs for the support of Warren Murdock, a pauper, whose legal settlement was alleged to be in Uxbridge. The case was submitted to the court upon the following facts agreed:

The said Murdock's legal settlement was in Uxbridge, and he was supported by the plaintiffs as a pauper. The plaintiffs gave due notice to the defendants that said Murdock had fallen into distress, and that the plaintiffs were furnishing him with support and relief as a pauper; and the defendants, immediately after receiving such notice, took measures to remove him from Webster to Uxbridge, and accordingly the overseers of the poor of Uxbridge went, without delay, to Webster, for the purpose of removing him; but learning that he was dead and unburied, they immediately removed his body to Uxbridge for burial, and within thirty days from the time of receiving the notice aforesaid.

On the 1st of April 1846, before this action was commenced, the defendants made a tender to the plaintiffs of the sum of nine dollars, which was sufficient to cover the whole amount which the plaintiffs would be permitted to recover against the defendants, in case the removal, within thirty days from the time of receiving the notice, as aforesaid, was such a removal as is contemplated by the fifteenth section of the forty sixth chapter of the revised statutes.

If the plaintiffs are entitled to recover the actual expense incurred by them in the support and relief of said pauper, judgment is to be rendered for them for $36·48.

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Bacon, for the plaintiffs.

Chapin, for the defendants.

SHAW, C. J. By Rev. Sts. c. 46, § 15, reënacting, in this respect, *St.* 1821, c. 94, § 3, it is provided, that the town of a pauper's settlement shall be liable to the town affording support, at the rate of one dollar per week only, although the actual cost may be much more, provided the town of his settlement "shall cause him to be removed within thirty days from the time of receiving notice that such support has been furnished." It has been held that this proviso is a strict condition, without an exact compliance with which, the town of the pauper's settlement is liable, to the town furnishing relief, for the actual expenses. *Ware* v. *Wilbraham*, 4 Pick. 45. *Seekonk* v. *Attleborough*, 7 Pick. 155.

In the former case, whilst the town of the pauper's settlement were preparing to remove her, she herself removed to another town; and the condition was held not to be complied with. In the latter, the pauper was too ill to be removed, but the town of his settlement provided by contract for his relief, at their expense, in the town where he was. This was held not to be a compliance with the condition, or a legal substitute. And in both cases the town of the settlement was charged with the actual expenses.

The court are of opinion that the death of the pauper before removal, by which a removal of the pauper, within the meaning of the law, is prevented, is within the same principle; and that preparation to remove the pauper, before his decease, or the removal of the dead body afterwards, is not a compliance with the condition.

The removal, contemplated by the Rev. Sts. c. 46, § 19, is the removal of a living person, and is a conclusive admission, by the town thus removing him, of his settlement in that town, and exempts the town from which he is removed from any costs and expenses for his support there, or at any future time, and from any trouble and expense in contesting the question of settlement. They therefore ought not to be deprived of an indemnity for the expenses actually incurred

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without an exact performance of a condition intended for their benefit. *Judgment for the plaintiffs.*

REUBEN S. DENNY *vs.* JOHN W. LINCOLN.

A master in chancery, after reciting that attachments had been laid on the estate of an insolvent debtor, by A. and B., and by certain other persons whose names were to him unknown, passed an order that said attachments should survive, according to the provision of *St.* 1841, *c.* 124, § 5; that the assignees should have power to proceed with the suits in which the attachments were made; and that the messenger should give notice to the attorneys in said suits, and to the attaching officers, by serving them with an attested copy of said order: Such service was made on all the attaching officers, and on the attorney of C., an attaching creditor who was not named in the order. *Held*, that C.'s attachment survived, and that the assignees had authority to proceed with C.'s suit against the insolvent debtor.

It seems that actual notice to a creditor, of an unrecorded mortgage of the personal property of his debtor, does not debar him from taking such property by attachment or execution: But if any notice will debar him, it must be notice that is full, clear and explicit, so as to designate the specific property bound by the mortgage, by marks and numbers, or other description, capable of identifying it; especially when it is left in the possession of the mortgagor: The notice must express the sum for which the property is bound, and must give substantially the same information as would be given by an inspection of the mortgage deed.

SHAW, C. J. This was an action of trover against the sheriff of Worcester, for certain property which the plaintiff claims, as mortgagee, under a mortgage made to him by Horace B. Tebbetts. The alleged conversion was, that the machinery, thus claimed by the plaintiff, had been seized and sold on an execution that issued on a judgment recovered against said Tebbetts, at the suit of Francis O. Calvert.

The case comes before us on the report of the judge before whom it was tried; it having been taken from the jury, by consent of parties. It appears by the report, that the property consisted of certain worsted machinery, in the factory of Tebbetts in Leicester, mortgaged to the plaintiff, by deed dated December 29th 1845, which was recorded in the registry of deeds for the county of Worcester, January 6th, 1846, and in Leicester town records March 3d 1846, and in Boston

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city records March 7th 1846. The attachment on mesne process, at the suit of Calvert, was made February 9th 1846, in which suit judgment was recovered in Suffolk court of common pleas, July term 1846. After this attachment, and before judgment, Tebbetts went into insolvency; Calvert and John G. King, jr. were duly appointed his assignees; they came into Calvert's suit, and claimed to prosecute the same, and preserve the attachment, for the general benefit of the creditors, pursuant to the provisions of *St.* 1841, *c.* 124, § 5.

The plaintiff denies the right of the assignees thus to come in and prosecute Calvert's action, and preserve the attachment, and insists that, by Tebbett's insolvency, Calvert's attachment was dissolved, and thereby that his, the plaintiff's, mortgage became the prior lien, and was valid. 4 Met. 470.

The objection to the right of the assignees to prosecute under the statutes was founded on the fact, that the order of the master, authorizing them so to prosecute, did not specify the action of Calvert against Tebbetts, by name. The master, after reciting that Tebbetts had applied to him for the benefit of the insolvent laws, that a warrant had been issued to a messenger, and that certain attachments had been laid upon the property of Tebbetts, by Calvin Foster, Amos Brown and Samuel J. Fox, partners, and others named, "and certain other persons, whose names" were alleged to be by him "unknown," passed an order in these words: "The said attachments are hereby ordered to survive according to the provisions of the act in addition to an act for the relief of in solvent debtors, passed March 18th 1841; and the assignee or assignees, hereafter to be chosen or appointed, shall have power, with the permission of the court or courts, to which said writs are returnable, to proceed with the suits aforesaid, against said Tebbetts, to final judgment and execution; and the amount recovered, exclusive of costs, shall vest in the assignees. And the messenger, in the case of said Tebbetts, is ordered to give notice to the attorney or attorneys in the said suits, and to the officers, by whom said attachments were made, by causing them to be served with an attested copy of

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this order." The messenger made return on said order, that he had given notice, as therein directed, to the officers by whom the attachments were made, and (among other attorneys) to Joel Giles Esq. attorney for Francis O. Calvert.

It was objected to the plaintiff's mortgage, that it was not recorded, pursuant to the statute, before the attachment, and therefore that the attachment made by Calvert, if regularly pursued, must prevail over the mortgage. It is very clear, that the registration of the deed, being a mortgage of personal property, in the county registry, was inoperative and void. The registrations in the town clerk's office of Leicester, and the clerk's office of Boston, according to the provisions of Rev. Sts. *c.* 74, § 5, and *St.* 1843, *c.* 72, § 2, being the places in which the mortgagor resided, and where he principally transacted his business, were made after the creditor's attachment. The attachment of Calvert, therefore, being first in time, would be prior in right, if it was not void, as against the plaintiff's mortgage, on the ground that the attaching creditor had actual notice of it, and if it was rightly prosecuted to judgment. Both of these points are contested.

The case presents the general question, whether notice in fact of an unrecorded mortgage of personal property debars a creditor from taking such property by attachment or execution. There is no exception in the Rev. Sts. *c.* 74, § 5, of such actual notice, as there is in reference to a deed of real estate, in Rev. Sts. *c.* 59, § 28. But the case of *Houghton* v. *Bartholomew*, 10 Met. 138, was strongly urged as a case in which it has been decided, that a person having notice of a sale of an equity of redemption at an officer's auction sale, though not recorded within the time required by law, could not attach against such unrecorded deed; adhering to the old rule on that subject. Without impugning the authority of that case, we think there are so many and such marked differences between the rules governing the conveyance and transfer of real and personal estate, that it is not safe to rely upon the analogy between them.

We are inclined to the opinion, that an attachment would

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hold against the unrecorded mortgage, although the attaching creditor had notice of it, if it were necessary now to decide that question. But in looking at the manner in which the case was reserved, we find that the attaching creditor denied that he had notice of the mortgage under which the plaintiff claims; and it is submitted to the court, as a question of fact, upon the evidence reported for that purpose.

If such notice of the prior mortgage is sufficient, without its registration, we think it must be full, clear and explicit, so as to designate the specific property bound by the mortgage, either by marks and numbers, or other description, capable of identifying it, especially where it is not separated and taken possession of by the mortgagee, but is left in possession of the mortgagor. Such notice must express the amount or sum for which the property was bound, and generally it must give substantially the same information as would be given by an inspection of the deed.

Upon he evidence, the court are of opinion that the notice to the attaching creditor was insufficient to satisfy these conditions. The information given him by the debtor was, that his machinery was mortgaged. In fact, part only was mortgaged; and there was other property, of like kind, in the same mill, which was not mortgaged; and the notice did not distinguish, as the deed would do, what specific part of the whole was bound. It was either imperfect or deceptive. The testimony upon this point comes from Tebbetts, the debtor. He says, "I told Calvert, that I had given a mortgage on my machinery for $5000, and had received $1500 of it. I did not say what machinery. There were articles named in the mortgage which were not in the factory, and other articles in the factory which were not mortgaged. I told him Denny was to furnish me with money on a mortgage of my property in Leicester. I had other machinery in the mill, not mortgaged to Denny, to the amount of three or four thousand dollars." From this, and the whole of the evidence, we are satisfied that the attaching creditor had no definite notice, nothing by which he could distinguish what property specifically was mortgaged; and it fails to satisfy the requisite conditions.

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The court are of opinion, that the order passed by the master, directing that the action, in which Tebbetts's property was attached, should be prosecuted to judgment, by the assignees, for the benefit of the creditors, designating them by a description sufficient to include Calvert's, though not specified by its title, was sufficient; it appearing that notice was forthwith given to the officer and attaching creditors' attorneys, including the attorney of the creditor Calvert.

Judgment for the defendant

C. Allen & Hartshorn, for the plaintiff.

H. H. Fuller & J. Mason, for the defendant.

SETH ALDEN *vs.* JOHN W. LINCOLN.

When mortgaged goods are attached, and the mortgagee makes demand on the attaching officer to pay the mortgage debt, according to the provisions of the Rev Sts. *c.* 90, and the officer does not make payment within twenty four hours, the mortgagee becomes entitled to the immediate possession of the goods, and may maintain an action of trover against the officer, although the mortgage was made to secure a note payable on demand, and the mortgagee had never demanded payment of it, and although the mortgagor was entitled, by a provision in the mortgage, to retain possession of the goods until condition broken.

A. mortgaged goods, with a provision that he might retain possession thereof until the condition of the mortgage should be broken, and afterwards, before the mortgage was recorded, formed a partnership with B., and put the goods into the partnership stock, and he and B. treated them as partnership property: After the partnership was dissolved, and after the mortgage was recorded, A. conveyed the goods to B. in trust to pay the partnership debts, and they were subsequently attached by creditors of the partnership, before breach of the condition of the mortgage. *Held*, that the mortgagee's property in the goods was not divested, and that he might demand, of the attaching officer, payment of the mortgage debt, and thereby entitle himself to all the rights given to a mortgagee by the Rev. Sts. *c.* 90.

THIS was an action of trover, brought against the sheriff of Worcester for the conversion of sundry articles by Edwin Eaton, one of his deputies. At the trial, in the court of common pleas, before *Washburn*, J. the plaintiff claimed title to the articles alleged to have been converted, under a mortgage made to him by Benjamin P. Rice, on the 25th of May 1843,

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and recorded on the 16th of December 1845, to secure payment of a note given to the plaintiff by said Rice for $361·67, payable on demand. There was a provision in the mortgage, that Rice might retain possession of the mortgaged articles until condition broken.

The plaintiff gave in evidence a writ, dated March 12th 1846, returnable to the court of common pleas at the following June term, in favor of George M. Rice and others against Benjamin P. Rice and Charles Belcher, and the return thereof by said Eaton, stating that he had attached said articles on the day of the date of said writ, and had afterwards sold them upon mesne process, pursuant to the provisions of the Rev. Sts. *c.* 90.

One witness, called by the plaintiff, testified to the identity of the articles mentioned in said mortgage and in Eaton's return of the attachment on said writ; and another witness testified that the plaintiff made a demand on Eaton, on the 14th of March 1846, by a writing (a copy of which the witness produced in court) in which he stated, as was admitted by the defendant's counsel, a just and true account of the debt for which the attached property was liable to him by the mortgage, as required by the Rev. Sts. *c.* 90, § 79.

No other evidence was offered of any demand upon the mortgagor, or upon Eaton, before the commencement of this action.

It was admitted that Benjamin P. Rice and Charles Belcher had taken the benefit of the insolvent laws of this Commonwealth; that the first publication, on the petition of Rice, was made on the 25th of February 1846, and on that of Belcher, on the 5th of August 1846; and that Rice had received a discharge under said laws, but that Belcher had not.

The defendant called said Benjamin P. Rice as a witness; and he testified that a partnership in the baking business was formed between him and said Belcher in December 1844, which was dissolved on the 31st of October 1845; that when said mortgage was made, he was the individual owner of the articles mortgaged by him to the plaintiff; that said articles

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were put into the partnership by him, and were used and treated as partnership property; that when the partnership was dissolved, said articles were not left with him to pay the partnership debts, but that he paid Belcher a certain sum per month for the time they had been together, as if they had not been in partnership; and that Belcher left every thing in his (Rice's) hands, as it was when he (Belcher) came into the partnership; "that Belcher, when he came into the partnership, put into the concern a note which he held against him (Rice) by purchasing half the property and giving his (Belcher's) note to him (Rice) for the balance of the half over and above the amount of his (Rice's) own note, given up; and that when they dissolved, he (Rice) gave up to Belcher the note he had given for the balance of the half of the property." Said Rice also testified that the debts of the partnership had not all been paid; that he agreed with Belcher to pay all the debts of the partnership, "but that nothing was said of the property being left to pay the debts with; that they settled, and that he (Rice) was to have all, as if Belcher had not come into the partnership; and that Belcher gave him no bill of sale of the property, but left it just as it was when he came in."

The defendant then offered in evidence a writing, dated December 21st 1845, purporting to be a conveyance, by said Rice to said Belcher, (including the articles mortgaged to the plaintiff,) of the partnership property, in trust for payment of the debts of the partnership. But the judge ruled that it was incompetent, unless known and permitted by the mortgagee, (the plaintiff,) except for the purpose of impeaching the validity of the original mortgage; and the writing was not read to the jury.

The defendant contended that, upon the foregoing evidence, trover could not be maintained. But, it having been admitted that, upon the demand on the officer by the plaintiff, no payment had been made towards said mortgage debt, the judge overruled the objection. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

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B. F. Thomas, for the defendant. Trover will not lie in this case. There was no demand on the mortgagor, by the plaintiff, for payment, until after the attachment; so that there was no breach of the condition of the mortgage, and the plaintiff, when this action was brought, had no right to immediate possession of the mortgaged articles. *Gordon* v. *Harper*, 7 T. R. 9. *Wheeler* v. *Train*, 3 Pick. 255. *Fairbank* v. *Phelps*, 22 Pick. 535. A demand on the mortgagor, by the plaintiff, was necessary, in order to give the plaintiff a right of possession; for the mortgage provided that the mortgagor might retain possession till condition broken. This provision in the mortgage was nugatory, unless the plaintiff thereby stipulated, in legal effect, to make a demand, in order to constitute a breach of the condition. *Forbes* v. *Parker*, 16 Pick. 462. *Bradley* v. *Copley*, 1 Man. Grang. & Scott, 685. Rev. Sts. *c.* 107, § 9.

The writing which was rejected should have been admitted in evidence to contradict the testimony of Rice, although he was called as a witness by the defendant. Though the defendant could not impeach his own witness, yet he might prove facts contrary to his testimony. *Rex* v. *Oldroyd*, Russ. & Ry. 88. 1 Greenl. on Ev. §§ 442, 443.

The articles mortgaged became partnership property, and could not be taken from the creditors of the firm, in consequence of the recording of the mortgage after the articles became the property of the firm.

Hartshorn, for the plaintiff. This action well lies, as the plaintiff had the right of possession. There was a breach of the condition of the mortgage, inasmuch as the note was payable on demand; and no demand was necessary in order to maintain an action on the note. The mortgagor had no right to keep possession for any specified time. In *Fairbank* v. *Phelps*, cited for the defendant, there was no demand, either on the debtor or the attaching officer. There was an end of the contract of bailment, in the present case, by the conveyance of the property to Belcher; so that the plaintiff might sue immediately. *Ayer* v. *Bartlett*, 9 Pick. 156. *Daniels* v. *Pond*, 21 Pick. 371

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The demand made on the officer, before action brought, and the omission to pay, constituted a breach of the condition of the mortgage. A creditor, who attaches mortgaged goods, puts himself in the mortgagor's place, and, by refusing payment on demand, becomes liable. The Rev. Sts. c. 90, §§ 78, 79, give the plaintiff the right to maintain this action, under the circumstances of the case. By § 79, if payment is not made to the mortgagee, within twenty four hours after demand, "the property shall be restored to him." The plaintiff, therefore, when he commenced this action, had the right to immediate possession.

The writing, which was refused to be received in evidence, was immaterial, being made after the perfecting of the plaintiff's title, by recording the mortgage. It was also inadmissible, because it tended to impeach the defendant's own witness. If Rice had not been a witness, the writing would not have been admissible, as it was a mere declaration, not under oath. The testimony which a party may introduce, to contradict his own witness, must be competent testimony. Showing that a witness has given a different account of the same matter is impeaching him. 1 Greenl. on Ev. § 462.

Wilde, J. The general question in this case is, whether, upon the facts reported, the action of trover can be maintained. It is contended for the defendant, that if any action could be maintained, it should be an action upon the case. But we are of opinion that trover is the proper action. By the mortgage deed from Rice, the owner of the goods which were sold by the defendant, the plaintiff acquired the legal title thereto; and although Rice afterwards formed a partnership with Belcher, and the same goods were put into the copartnership by him, and were used and treated as partnership property, yet this did not divest the plaintiff's right of property. Nor did the conveyance of the goods to Belcher, in trust for the payment of the partnership debts, convey the legal title. Before that conveyance, the plaintiff's mortgage had been recorded; and this conveyance was rightly rejected.

The remaining objection is, that the plaintiff had not the

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possession, nor the right of possession, of the goods mortgaged; the mortgage having been given to secure a note payable on demand, and it being agreed that the mortgagor should have possession until condition broken; so that until the demand of payment of the mortgage debt of the mortgagor, the mortgagee would not have the right of possession. We are, however, of opinion that no demand on the mortgagor was necessary. By the Rev. Sts. c. 90, § 78, the officer was authorized to attach and take possession of the property mortgaged, and thereby to terminate the possession of the mortgagor. The demand of payment of the mortgage debt was then rightly made on the attaching officer, and he was thereupon bound, by the express words of the statute, (§ 79,) to pay the same within twenty four hours, or to restore the property to the mortgagee. It is admitted that, before the commencement of this action, the officer sold the property without paying the mortgage debt. This was a conversion of the property, of which the plaintiff certainly had the right of possession. In this respect, the cases cited by the defendant's counsel are not applicable. In the case of *Forbes* v. *Parker*, 16 Pick. 462, it was held that an action on the case would lie by a mortgagee against an officer who attached and sold the mortgaged property as the property of the mortgagor, without payment of the mortgage debt. But in that case, the court considered that the swine mortgaged had been let by the mortgagee to the mortgagor, for the term of six months, for the purpose of fattening and preparing them for market, and that the six months had not expired at the time of the sale; and that the plaintiff had only a reversionary interest in the property. The mortgage debt also was not payable until the expiration of the six months. Whether by the revised statutes the action of trover in such a case could be maintained or not, we are well satisfied that it is the proper form of action in the present case. In the case of *Forbes* v. *Parker*, there was no demand on the officer, nor did he proceed under *St.* 1829, c. 124. Nor did that statute contain the provision contained in the Rev. Sts. c. 90, §§ 78, 79, that the

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mortgage debt should be paid within twenty four hours after demand, or the property be restored to the mortgagee. By that provision, the plaintiff was unquestionably entitled to the possession of the property attached. He had the legal title, and the sale by the officer was a conversion, which, it is admitted, was made before the commencement of this action.

Exceptions overruled

EDWARD CLARKE *vs.* FRANCIS SIBLEY & others.

The owners of several estates, being jointly interested in the water power connected therewith, formed a company, and entered into an agreement, by indenture, in which each covenanted, for himself and his personal representatives or assigns, with the others and their respective personal representatives or assigns, and his and their respective estates, for the faithful performance of the conditions and provisions of said indenture, "meaning and intending to create a lien upon and to bind" their "said estates, so far as" they might, "in law or equity, do the same, and" their "several heirs, executors, administrators, or assigns, so far as said estates," &c. were "concerned, and to the extent thereof, and no further, as fully and absolutely, and as far as" they might "do the same, either in law or equity, for the faithful discharge and fulfilment of all the liabilities of said company, and of the requirements and provisions of said indenture:" C., one of the parties to said indenture, having afterwards incurred expense, pursuant to the provisions of the indenture, for the purpose of increasing the water power, in which all the parties to the indenture were jointly interested, brought a bill in equity against third persons, to whom some of said parties had conveyed their said estates, praying that they might be held to pay him their shares and proportions of said expense, and also praying for general relief. *Held*, that the indenture could not be so construed as to operate as a legal mortgage; that it could be regarded only as an equitable mortgage; that if it created any lien, implying a trust, it was a trust *sui generis*, in the nature of an equitable mortgage, of which the court has no jurisdiction; and that the bill must be dismissed.

WILDE, J. This is a bill in equity, brought against Francis Sibley, William A. Robinson, and Edward M. Robinson. The bill is founded on an agreement, by indenture, between the plaintiff and several other persons named in the bill, in which they covenanted with each other to pay and discharge their respective shares of certain expenses agreed to be incurred, for the purpose of increasing the water power, in which they were jointly interested, as a company. The following

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are the clauses in the said agreement, on which the plaintiff relies: "It is hereby agreed between the said parties and the members of said company, each for himself respectively, and for his respective executors, administrators or assigns, does covenant, promise and agree, each with the other of them, his respective executors, administrators or assigns, and his and their respective estates hereinafter mentioned, and to the extent hereinafter mentioned, for the due and faithful execution and performance of all the conditions and provisions of this instrument." And after enumerating those conditions and provisions, the following clause is added: "Meaning and intending hereby to create a lien upon, and to bind, our said estates, so far as we may in law or equity do the same, and our several heirs, executors, administrators or assigns, (so far as said estates, water power, mills and manufacturing establishments are concerned, and to the extent thereof, and no further,) as fully and absolutely, and as far as we may do the same, either in law or equity, for the faithful discharge and fulfilment of all the liabilities of said company, and of the requirements and provisions of this instrument, so long as they shall remain members of this company, as is hereinafter provided."

The defendants were not parties to this agreement; but the bill alleges, and they admit, that they have since purchased the estates of several of the parties to it, which estates were mentioned therein, and upon which the parties thereto intended to create a lien.

The bill alleges that the plaintiff has incurred an expense of four thousand dollars for the purpose of increasing the water power, in which the parties to said agreement were jointly interested, and he prays that the defendants may be held to pay him their shares and proportions of said four thousand dollars, with interest, and that the court will grant such further relief in the premises as justice and equity may require.

The defendants have severally filed an answer, in which various facts are stated, which the court have not found it

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necessary to scrutinize. A hearing was had, at a former term, on the bill and answers, and elaborate arguments were made In these arguments, several questions were discussed, which, according to the opinion of the court upon the main point in dispute, have become immaterial.

The question is, whether the defendants, by purchasing the estates of some of the original parties to the aforesaid agreement, have become liable to pay any share or shares of the expenses which have been incurred by the plaintiff in pursuance of that agreement.

The plaintiff's counsel contend that, by these clauses of the agreement, a charge was created on the estates now owned by the defendants, and that they are personally bound to pay the shares of the expenses claimed.

The question as to the defendants' personal liability we do not consider material; for if these are covenants running with the land, as the plaintiff contends, he has an adequate and appropriate remedy at common law, by an action of covenant. We think it, however, very clear, from the authorities cited, that these are not covenants running with the land, and that the defendants are in no respect liable to contribution for the expenses claimed, unless by the agreement a charge was created on their estates. The main question therefore is, whether the defendants' estates are thus charged. It has been argued, that the agreement may be so construed, as to operate by way of mortgage; such being the intention of the parties, although there are no words of grant in the agreement, by which any estate would pass from the covenantors. That this agreement is to be construed according to the intention of the parties, if it can be done consistently with the rules of law, is very true; but this must clearly appear from the words of the deed; and this, we think, does not appear. The parties intended, no doubt, to create a lien on their respective estates, either in law or equity; for such is the language of the agreement. But it cannot be inferred that they intended to convey their estates to each other by legal mortgages; for, in such case, the mortgagees would be entitled to immediate possession

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although they had made no advances, and had incurred no liabilities, under the agreement. The language of the agreement is inconsistent with any such inference. The intention of the parties was, as expressed, to create a lien on, but not to convey, their estates. This argeement, therefore, cannot be construed as conveying any estate by way of a legal mortgage; it can only be considered as an equitable mortgage, of which this court has no jurisdiction, as was decided in *Eaton* v. *Green*, 22 Pick. 526.

But if this were a mortgage in common form, the plaintiff's proper remedy would be by a writ of entry.

Then it has been argued for the plaintiff, that the lien created by the agreement operates on the defendants' separate estates, by way of an implied trust, of which this court has jurisdiction by the Rev. Sts. *c.* 81, § 8. That a mortgage is considered as a trust, and the mortgagee a trustee of the mortgagor, is very true; but it is a trust *sui generis*, which is defined with great ability and perspicuity by Sir Thomas Plumer, in *Cholmondeley* v. *Clinton*, 2 Jac. & Walk. 183, 184. "It is only," he says, "in a secondary point of view, and under certain circumstances, and for a peculiar purpose, that the character of trustee constructively belongs to a mortgagee. No trust is expressed in the contract; it is only raised by implication, in subordination to the main purposes of it, and after that is fully satisfied; its primary character is not fiduciary." "A trustee is stopped in equity from dispossessing his *cestui que trust*, because such dispossession would be a breach of trust. A mortgagee cannot be stopped, because in him it is no breach of trust, but in strict conformity to his contract." "This presents no resemblance to the character of a trustee, but to a character directly opposite." Now, we are of the opinion that if any lien, implying a trust, was created by this agreement, it was a trust of this peculiar nature. The parties intended, we have no doubt, to create a lien on their separate estates by way of mortgage; but not such a mortgage as can be enforced, by the rules of law or equity, in this Commonwealth It was intended to create a lien, without conveying

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any legal title in their estates, as collateral security for the performance of the covenants in the indenture. No fiduciary trust was expressed or intended. Such a lien might be enforced by a court having jurisdiction of equitable mortgages; but it was well settled, in *Eaton* v. *Green*, that this court has no such jurisdiction. By the Rev. Sts. *c.* 107, § 34, our jurisdiction, in cases of mortgages, is limited to those made by a common deed of mortgage, or such as are made by a conveyance, with a separate deed of defeasance.

This principle being settled, it cannot be supposed that the legislature intended to enlarge the jurisdiction of the court by the Rev. Sts. *c.* 81, § 8, so as to extend to trusts arising from legal or equitable mortgages. It is a settled rule of construction of the statutes conferring equity jurisdiction, that it is not to be extended beyond what is manifestly given.

In *Hunt* v. *Maynard*, 6 Pick. 489, it was decided that the court had no jurisdiction, by *St.* 1817, *c.* 87, of any trust created by a mortgage deed. Such a deed, it was said, "does not *per se* create a trust; it conveys the estate subject to a condition. The mortgagee is not accountable to any one, until he enters and takes possession, and receives the rents and profits; in which case he may, in some sense, be considered as trustee; for he is to render an account. But this must be done in the manner and for the purposes provided in the several statutes for redeeming mortgages, and he is not trustee in any other light." So in *Putnam* v. *Putnam*, 4 Pick. 139, it was decided that no additional authority was given to this court, as a court of equity, on the subject of redeeming mortgages, by any of the several statutes which had been passed in relation to the chancery jurisdiction of this court. The same rule of construction must apply to the Rev. Sts. *c.* 81, § 8, and is decisive against the plaintiff's claim.

Bill dismissed.

Newton & Bridges, for the plaintiff.

Barton & Bacon, for Sibley.

E. Washburn, for W. A. and E. M. Robinson.

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Benjamin Cragin, Jr. & another *vs.* Lawson Warfield & another.

A writ, in which the amount of the plaintiff's damages is wholly omitted, may be amended, by leave of the court, by filling the blank with the proper sum.

Assumpsit on the money counts. The writ was returnable to the court of common pleas, at December term 1845, and was then duly entered. The writ was served by an arrest of the defendant Warfield, and commitment of him to prison. No sum, as damages, was inserted in the writ, which was thus: "To the damage of the plaintiffs, as they say, the sum of dollars." At a subsequent term of said court, held by *Washburn*, J. the plaintiffs made the following motion: "And now the plaintiffs come and move the court for leave to insert the words 'three hundred' in the *ad damnum* of their writ, the same having been omitted by mistake." The court allowed the amendment, and a verdict was rendered for the plaintiffs for $89·41. The defendants filed exceptions.

E. Fuller, for the defendants. The *ad damnum* was not amendable, it being left blank in the writ. By the Rev. Sts. *c.* 82, § 4, "no action shall be commenced in the court of common pleas, wherein the debt or damages demanded do not exceed twenty dollars, except real actions," &c. That court, therefore, on the face of the writ, had no jurisdiction, and could not acquire jurisdiction by an amendment. In *Hoit* v. *Molony*, 2 N. Hamp. 322, such an amendment, even after verdict, was held not to be allowable, as it "would be an assumption of jurisdiction."

Bacon, for the plaintiffs. The Rev. Sts. *c.* 100, § 22, authorize the court in which any civil action is pending, at any time before judgment rendered therein, to "allow amendments, either in form or substance, of any process, pleading or proceeding in such action." In *McLellan* v. *Crofton*, 6 Greenl. 307, an amendment like this was allowed after verdict; and Mellen, C. J. said, "it would be matter of regret,

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if not of reproach to our laws, and to the administration of them, if such a motion could not be sustained. We entertain no doubt on the point."

Wilde, J. Whether the blank, which the court of common pleas allowed to be filled, by way of amendment, be regarded as matter of "form or substance," it is very clear, under the Rev. Sts. c. 100, § 22, that the amendment was well warranted. A similar amendment was held allowable, after verdict, in *McLellan* v. *Crofton*, 6 Greenl. 307. So in *Clark* v. *Herring*, 5 Binn. 33, under a statute of Pennsylvania, which authorized the amendment of declarations before trial, a plaintiff was permitted to increase the *ad damnum* from $600 to $900, on the trial. The jury found a verdict for a sum beyond the amount of the original *ad damnum*, and the defendant alleged the allowance of the amendment, as one of the errors for which the judgment on the verdict should be reversed. Yeates, J. said, "the amendment introduced no new merits into the case. The quantum of the demand, if any thing was due, was to be ascertained by the jury; and the defence would be precisely the same, whether the damages were laid at $600 or $900." So, in the present case, and in *McLellan* v. *Crofton*, the defence on the merits was not affected by the omission to lay any damages in the writ.

In *Converse* v. *Damariscotta Bank*, 3 Shepley, 431, it was decided that where a writ, in which the damages demanded exceeded $100, had been directed to and served by a constable, who had no authority to serve it, the *ad damnum* might be reduced, so as to justify the service. And before our revised statutes were passed, it was held, in *Danielson* v. *Andrews*, 1 Pick. 156, that the *ad damnum* in a writ might be increased, for the purpose of giving a right of appeal. But however all this may have been heretofore, since the revised statutes authorize amendments in matter of substance, as well as in matter of form, there can be no doubt in the present case.

Exceptions overruled.

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Loyal G. Dickerson *vs.* Daniel Mixter.

A. granted to B., by deed, a narrow strip of land "for the purpose of enabling the grantee to erect a mill dam:" By the same deed, A. granted to B. "the right to build, upon the land of the grantor, a mill or factory, somewhere near the northwest corner of S. W.'s land; and also the right to dig a canal or trench from said mill dam to such mill as may be erected; with the right of passing to and from said mill dam and mill, over the grantor's land:" B. built a mill dam on said narrow strip of land, and also a mill near the northwest corner of S. W.'s land, but not on the land of A., and dug a canal from said dam, partly through the land of A., to said mill, and, six years afterwards, entered upon A.'s land, through which the canal was dug, to repair and clear out the canal. *Held*, that said deed gave B. no right to dig a canal through A.'s land in any other place than that designated, namely, from said mill dam to a mill on A.'s land; and that A. might maintain an action of trespass against B. for entering on A.'s land to repair and clear out the canal, even though A. had acquiesced, for six years, in the building of the mill and the digging of the canal.

Trespass for breaking and entering the plaintiff's close in Leicester. Trial in the court of common pleas, before *Merrick*, J.

The plaintiff, after giving evidence of his title to the close described in his declaration, introduced testimony which showed that the defendant, in 1843 and 1844, entered said close, and then and there amended, repaired, and cleared out a trench or canal there, which extended, from a dam on Kettle Brook, through the plaintiff's land, to the defendant's mill, and through which canal the waters of said brook had been conveyed and conducted to said mill, since December 1837.

The defendant, in justification of the acts alleged to be trespasses, gave in evidence, among other things, a deed made by the plaintiff to Charles E. Waite, dated April 1st 1837, wherein, as the defendant contended, there was granted to said Waite a certain piece of land whereon to construct the mill dam now owned by the defendant, together with a right to erect the mill aforesaid, and to dig said canal, and to enter the plaintiff's land for the purpose of amending, repairing and clearing out said canal, &c. This deed conveyed to said Waite "a narrow strip of land in the easterly part of Leicester, on the east side of Kettle Brook, so called, bounded west by land conveyed by David Morton to John Waite, by deed dated

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October 15th 1836," and contained the following words: "This narrow strip of land being conveyed by me to the grantee, for the purpose of enabling him to erect a mill dam; and he is to take so much as may be necessary for that purpose, and may erect his dam to such a height as he shall think proper, but in no event to erect the same upon said brook farther south than the southerly line of the land conveyed by said Morton as aforesaid; and the wheel pit of any mill or factory which may be built by the said Charles E. Waite, his heirs or assigns, shall in no event be placed so low as to have a fall of less than twelve feet from the bottom of said wheel pit to the upper surface of the water in Samuel Watson's factory pond. Also the right to build, upon the land of the grantor, a mill or factory somewhere near the northwest corner of Samuel Waite's land, if the grantee, his heirs or assigns shall see fit; and also the right to dig a canal or trench from said mill dam to such mill as may be erected; said trench or canal, however, to be carried as far easterly as practicable, upon the side of the hill, and the fall, from the bottom of the wheel pit to said Watson's pond, never to be less than twelve feet; with the right of passing, to and from said mill dam and mill, over the grantor's land, in the usual way, as laid out by the grantor; and with the right of digging gravel on the premises of the grantor, doing as little damage as possible."

The defendant claimed title under the deed aforesaid, through sundry mesne conveyances, which he gave in evidence. He also gave evidence that his mill, though not built on the plaintiff's land, where alone the plaintiff contended it could be legally built, was built, in the latter part of the year 1837, on a small piece of land adjoining the land which is described in the plaintiff's writ as the place where the alleged trespass was committed, and 'near' to what was, at the date of the above mentioned deed, 'the northwest corner of Samuel Waite's land,' and which was purchased by said Charles E. Waite, (under whom the defendant claimed,) of Samuel Waite, soon after the date of said deed, for the purpose of

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erecting said mill thereon; that said mill was erected some rods from the southerly line of the plaintiff's land, near to which the plaintiff contended it should have been built; the race of said mill being so sunk and constructed as to convey the waters of said brook, used at the mill, through the defendant's land, a short distance, and then through the plaintiff's land to the plaintiff's mill pond; into which pond they would have been emptied, if the mill had been built on the plaintiff's land.

The judge instructed the jury, "that the grant in the plaintiff's deed of April 1st 1837, of a right to convey water through his land, was a grant to convey the water to a mill which should be built on the plaintiff's land, and that the defendant, not having built his mill on said land, derived from said grant no right to convey water through the plaintiff's land to the mill which was built on other land; and that the entry upon the plaintiff's land, and the acts, or repair and amendment, done to said trench by the defendant, who could claim only the rights of Waite, were in no wise justified by virtue of any rights, or the exercise thereof, conferred by the said deed of the plaintiff to said Waite."

The jury found a verdict for the plaintiff, for nominal damages, and the defendant alleged exceptions to the instructions given to the jury.

Bacon & F. H. Dewey, for the defendant.

C. Allen & Hartshorn, for the plaintiff.

Wilde, J. This case depends on the construction of the deed from the plaintiff to Charles E. Waite, from whom the defendant derives his title, by several mesne conveyances. By that deed, the plaintiff conveyed to Waite a narrow strip of land, for the purpose of enabling him to erect a mill dam thereon; and also the right to build, upon the land of the grantor, a mill or factory, and the right to dig a canal from said mill dam to such mill as might be so erected. The mill, however, was not built on the plaintiff's land, but several rods therefrom, and a canal was dug, from the mill dam to the race, across the plaintiff's land, which the defendant

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contends that the grantee, his heirs and assigns had a right to do, and to enter upon the plaintiff's land, to repair and clear out said canal; which is the trespass alleged in the plaintiff's declaration. But we are of opinion that Waite had no right, under the plaintiff's deed, to dig a canal in any other place than that designated in the deed. The course of the canal or trench was particularly designated in the deed, and there can be no doubt of the meaning of the grant.

It was contended, in the argument, that the plaintiff acquiesced in the building of the mill and the digging of the canal. But there is no evidence of that fact; and if there were any such evidence, it would not be material — the language of the grant being clear. *Exceptions overruled*

HARVEY TAINTER *vs.* ASA W. CLARK.

C., by his last will, gave to his wife the interest and income of $1000, and to his daughter the use and income of $1000, during her life: After making other devises and bequests, he devised and bequeathed the residue of his property, real and personal, to his daughter and her children, and to his grandson, in equal shares, subject to the rights and directions afterwards given, by the will, to the executor therein named, and subject to the payment of his (C.'s) debts: He then appointed T. his sole executor, and authorized him to sell and convey such of his (C.'s) property, as in T.'s judgment would best promote the interest of all concerned, to raise the $2000 for the use of C.'s wife and daughter, and to pay his debts: T. declined to act as executor, and D. was appointed administrator of C.'s estate, with the will annexed: C.'s widow waived the provision made for her by the will, and dower was assigned to her: D., under his appointment as administrator, and by no other authority, sold and conveyed C.'s real estate, for the purpose of raising money to pay C.'s debts and the legacies given by his will. *Held*, that D. had no authority to sell the testator's real estate, and that the sale and conveyance thereof by him were void, as against the testator's heirs.

WRIT OF ENTRY, to recover one undivided eleventh part of a tract of land in Leicester. The case was submitted to the court upon the following agreed statement of facts:

"Ephraim Copeland died, on the 3d of March 1842, seized of the demanded premises, and of other real estate in Leicester By his last will, made on the 27th of May 1837, and duly proved and allowed in August 1842, he made the

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following (among other) bequests: 'In the *first* place, I give, bequeath and devise to my wife, Tamesin Copeland, the income and interest of one thousand dollars. In the *second* place, I give to my daughter, Lucy Tainter, wife of Harvey Tainter, the use and income of one thousand dollars during her natural life. In the *fifth* place, I give, bequeath and devise in trust, to my executor hereinafter named, a strip of land [described] for the site of a school house, in case I should not erect one in my life time, and access thereto. Also one thousand dollars, at the decease of my said wife, for the following uses forever, to wit, to maintain a school house, and a school to be taught by a female or females, &c. And in order to accomplish said object, said trustee and his heirs shall have reasonable time to bring the same about. In the *seventh* place, I give, bequeath and devise all the rest, residue and remainder of my estate, real, personal and mixed, to my daughter, and her children born and to be born in lawful wedlock, and my grandson, Ephraim Copeland, in equal shares, subject to the rights and directions given by me to my executor hereinafter named, and to the payment of my just debts. In the *eighth* place, I hereby nominate and appoint Captain Jonas Tucker of Charlton to be the sole executor of this my last will and testament, and hereby authorize and fully empower him to sell and convey such of my property, as in his judgment will best promote the interest of all concerned, to raise the two thousand dollars for the use of my wife and daughter, and to pay my just debts.'

"The daughter mentioned in said will is the wife of the demandant, who had nine children born of her in lawful wedlock, and living at the time of the testator's death, and none born since. Lucy K. Tainter, one of said children, died September 16th 1844, leaving the demandant (her father) her heir; whose interest he seeks to recover in the present action.

"On the 4th of April 1842, the said Jonas Tucker declined the office of executor, in these words: 'I, the subscriber, having been named as executor, in the last will and testament

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of Ephraim Copeland, late of Leicester in said county, deceased, do hereby decline that trust. Jonas Tucker.' And in April 1842, Harvey Tainter, the demandant, was appointed special administrator of said Copeland's estate, and in May 1842, he returned to the probate office an inventory of said testator's property, in which his real estate, including the demanded premises, was appraised at $7566, and his personal property at $739·17. The amount of other personal estate, not appraised, was $129·50.

"In August 1842, Tamesin Copeland, the widow of the testator, waived the provision made for her in his will, and claimed her dower, which was, in November 1842, set out to her, to wit, a third part in value of the testator's real estate, but no part of the demanded premises.

"On the 3d of January 1843, Ebenezer Dunbar, a creditor of the estate, petitioned the judge of probate to be appointed administrator, with the will annexed, and, in pursuance thereof, on the first Tuesday of February 1843, administration of said estate was committed to him, with the will annexed In April 1843, he returned to the probate office an inventory of said testator's property, in which his real estate, including the demanded premises, was appraised at $6566, and his personal property at $65·16. Also good notes at $271·77, and bad notes $71·50.

"By virtue of the authority derived by this appointment of administrator, with the will annexed, and no other, the said Dunbar, after administering the personal property, proceeded to sell, at public auction, all the real estate left by said testator, (including reversion of land set off for his widow's dower,) for the purpose of raising money to pay the debts and legacies; and among the deeds executed by him, in his said capacity, is the deed conveying the tract of land, described in the demandant's writ, to the tenant, who is son in law of said Dunbar; said deed bearing date October 18th 1843. Notice was given of the sale of said real estate, and the same was sold at the times, and in the lots, and to the persons, and for the prices, mentioned in the affidavit of said Dunbar, filed in the probate office.

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"The demandant, previously to the sale, recommended how the real estate should be lotted out, in order to sell best, and it was sold in such number of lots as he had recommended."

After *G. Parker*, for the demandant, had stated the case, the court expressed a wish to hear the tenant's counsel first.

E. Washburn & Bacon, for the tenant. The question is, whether Tucker's authority to sell the land extended to Dunbar. See Rev. Sts. *c.* 63, § 5, and *c.* 71, § 20. The authority was given to Tucker, as executor, and passed to the administrator with the will annexed. The letters testamentary were the criterion and proof of the power, which was not a naked one, but was coupled with a trust. In England, Dunbar would have been compelled by a court of chancery to sell the real estate, in execution of the trust. The probate court could not exercise this power, and a license to sell, given by that court, would be a nullity. See *Farwell* v. *Jacobs*, 4 Mass. 634. *Crocker* v. *Crocker*, 11 Pick. 255. *Hall* v. *Cushing*, 9 Pick. 406. *Prescott* v. *Pitts*, 9 Mass. 376. *Jackson* v. *Ferris*, 15 Johns. 346. *Larned* v. *Bridge*, 17 Pick. 339. *Gibbs* v. *Marsh*, 2 Met. 243. *Brown* v. *Higgs*, 8 Ves. 574. *Franklin* v. *Osgood*, 14 Johns. 554. Co. Lit. 113 *a*, and Hargrave's note. Pow. Dev. (Jarman's ed.) 233, 239. The case of *Homer* v. *Shelton*, 5 Met. 462, was one in which the executors might exercise their power, or not, at their discretion. *Aliter*, in the case at bar.

The fifth clause in the will shows that a personal trust was not reposed in Tucker; for his heirs are intrusted with the management of the devise for the school.

A power defectively executed will not be disturbed by a court of equity. *Earl of Darlington* v. *Pulteney*, Cowp. 267.

When two intentions are expressed, a general and a particular one, and the particular intent cannot take effect, the words shall be so construed as to give effect to the general intent. Com. Dig. Poiar, B. 1. a. *Jackson* v. *Veeder*, 11 Johns. 169. In the present case, Tucker had the power to select the lands that should be sold, and also the power to sell. The general intention of the testator was to pay the

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debts and legacies. The particular intention was, that the surplus, if any, should be such of the estate as Tucker should select. The particular intent could not be carried into effect, because the whole real estate was required to pay the debts. The general intent, therefore, was well effected by the administrator's sale. Cruise's Dig. tit. 32, *c.* 20.

G. Parker, for the demandant. When a naked power is connected with a personal confidence, as in this case, the power cannot be transmitted. See *Ventress* v. *Smith*, 10 Pet. 161. *Combe's case*, 9 Co. 75. *Ingram* v. *Ingram*, 2 Atk. 88. Sugden on Powers, (1st Amer. ed.) 165, 166. 4 Kent Com. (5th ed.) 327. Pow. Dev. (1st ed.) 292. *Lancaster* v. *Thornton*, 2 Bur. 1027. *Cole* v. *Wade*, 16 Ves. 27. *Walter* v. *Maunde*, 19 Ves. 424. *Lessee of Moody* v. *Vandyke*, 4 Binn. 31. *Wills* v. *Cowper*, 2 Ham. 124. *Conklin* v. *Egerton's Administrator*, 21 Wend. 430.

The decision was made at September term 1848.

Wilde, J. In this case both parties claim title, respectively, under the last will and testament of Ephraim Copeland; and the case turns on the validity of the tenant's title. By the will, Jonas Tucker was appointed executor, in the words following: "In the eighth place, I hereby nominate and appoint Captain Jonas Tucker of Charlton to be the sole executor of this my last will and testament, and hereby authorize and fully empower him to sell and convey such of my property as in his judgment will most promote the interest of all concerned, to raise the two thousand dollars for the use of my wife and daughter, and to pay my just debts." The executor renounced and declined the trust as executor, and Ebenezer Dunbar, a creditor of the testator, was duly appointed administrator of his estate with the will annexed; and afterwards sold and conveyed the demanded premises to the tenant. The question is, whether this was a valid conveyance. It is contended for the tenant, that it was, by virtue of the power given to the executor, which devolved on the administrator on his appointment to administer the estate according to the will.

It is admitted that if this were merely a naked power to

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sell, it would not by law be transmissible to the administrator; but it is argued, that this power was coupled with a trust, and was therefore well executed by the administrator. On the other hand, the demandant's counsel contends, that the power was given to Tucker *nominatim*, and not *qua* executor; and whether coupled with a trust or not, it was not transmissible to the administrator.

In most of the English authorities cited on this point, the question was, whether, when a power was given to several, and one of them died, or refused to act, the power would survive. Lord Coke makes a distinction between those cases where a power is to persons *nominatim*, and those where it is given to them by the name of their office. "If," he says, "a man deviseth his lands to A. for term of life, and that after his decease his lands shall be sold by his executors generally, and make three or four executors, and during the life of A. one of the executors dieth, and then A. dieth, the other two or three executors may sell; because the land could not be sold before, and the plural number of his executors remain. But if they had been named by their names, as by L. S., L. N., &c. his executors, then in that case the survivors could not sell the same; because the words of the testator could not be satisfied." Co. Lit. 112 *b*. 113 *a*. Mr. Hargrave in his notes on Co. Lit. (note 146) expresses the opinion that this distinction has the appearance of too curious and overstrained a refinement; and he cites a case in which it was adjudged against the distinction. But he admits that it had been adopted in cases subsequent to the publication of Coke upon Littleton. Mr. Sugden, after reviewing the authorities, states the following propositions as deducible therefrom: 1. That where a power is given to two or more by their proper names, who are not made executors, it will not survive without express words. 2. That where it is given to three or more generally, as to "my trustees," "my sons," &c. and not by their proper names, the authority will survive whilst the plural number remains. 3. That where the authority is given to "executors," and the will does not expressly point

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to a joint exercise of it, even a single surviving executor may exercise it. But, 4. That where the authority is given to them *nominatim*, although in the character of executors, yet it is at least doubtful whether it will survive. Sugden on Powers, (1st Amer. ed.) 165, 166. These propositions seem to be well sustained by the authorities, and the weight of authority is in favor of the distinction laid down by Lord Coke.

But the question in this case is not whether a power given to two or more executors to sell will survive, if one dies or refuses to act. At common law, before the *St.* of 21 Henry 8, *c.* 4, it is clear that it would not. But by that statute it was provided that where lands were devised to be sold by executors, and some of them refuse to accept administration, all sales by the executor or executors who do accept shall be as valid as if all the executors had joined. The question has been, whether this statute extended to executors where a power to sell was given to them *nominatim*. And all the authorities agree, that if a power is given, indicating personal confidence, it must be confined to the individual or individuals to whom it is given, and will not, except by express words, pass to others than the trustees originally named, though they may, by legal transmission, sustain the same character. So it was decided in *Cole* v. *Wade*, 16 Ves. 27, and in many other cases.

That such a personal confidence in the executor is indicated by the will, in this case, is manifest. He was to raise $2000, to hold in trust, and to pay over the interest of $1000 to the widow of the testator, and the interest of the other $1000 to his daughter, during their respective lives, and after their decease to appropriate the principal to other uses. If, then, this power, coupled with a trust, had been given to two executors by name, and one had died or declined the trust, the other could not have executed the power. And clearly such a power cannot be delegated, or legally transmitted, to an administrator with the will annexed.

There is another ground on which we hold, very clearly, that the power to sell has not been transmitted to the administrator, if by law it could be. Tucker, the donee of the

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power, has never renounced it, and the consequent trust; and we are not aware of any impediment to his executing it. He has, it is true, declined the office of executor, but the power of selling real estate is no part of the business of an executor or administrator, unless he obtains license under the statute; he has no interest in the land, and no authority to sell it, except the authority which may be derived from the statute. The executor, in this case, was the donee of a trust power, which was distinct from the office of executor, and the trust might exist for years after the duties of the office of executor had been fully performed. This trust power has never been renounced, and consequently has not been transmitted to the administrator. This point has been very fully considered in *Wills* v. *Cowper*, 2 Ham. 124, and in *Conklin* v. *Egerton's Administrator*, 21 Wend. 430. In the latter case, a power had been granted by will to an executor, to sell and dispose of real estate, and to divide the proceeds among devisees to whom the estate was given by a previous clause of the same will. The executor died without having executed the power; and it was held, that the power could not be executed by an administrator *cum testamento annexo*, notwithstanding the provisions of the revised statutes of New York, that "in all cases where letters of administration with the will annexed shall be granted, the will of the deceased shall be observed and performed; and the administrators of such will shall have the rights and powers, and be subject to the same duties, as if they had been named executors in such will." This decision is fully sustained by a well established principle of the common law, as laid down in numerous authorities. In the year book, 15 Hen. 7, 11, it is laid down for good law, "that if a man has feoffees upon confidence, and makes a will that his executors shall alien his lands, there if the executors renounce administration of the goods, yet they may alien the land, for the will of land is not a testamentary matter." And it was there said that "it was lately adjudged in the exchequer chamber, by all the judges of England, that if a man makes a will of his lands, that his executors shall

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sell the land, and alien, &c. if the executors renounce administration and to be executors, there neither the administrators nor ordinary can sell or alien, &c." Sugden on Powers, Appx. No. 1. This doctrine has been maintained ever since, by numerous judicial decisions. It is true that where there is a power in a will to sell, without naming a donee of the power, the executor will have the power by implication, if he is to distribute the proceeds of the sale. So the executor of the executor, in such a case, might execute the power, by a like implication. But I apprehend no case can be found where such an implication has been extended to an administrator with the will annexed. Mr. Justice Cowen, who delivered the opinion of the court in the case above cited from 21 Wend. 430, and whose extensive knowledge of books of authority is well known, says, "I have been unable to find a single book which suggests that an administrator was ever considered as coming, by implication, within any clause by which a power of sale is devised even generally." But if such an implication might be sustained in any case, we think it very clear that it cannot in the present case. Here the power given was coupled with a trust; and personal confidence was reposed in the executor and trustee. A part of the proceeds of sale was to be held by him for an indefinite length of time, and could not be paid over to the testator's wife and daughter, who were only entitled to the interest during life. This is therefore a much clearer case than that of *Conklin* v. *Egerton's Administrator*, if there be any doubt of the correctness of that decision; for the executor in that case was to pay over the whole proceeds of sale immediately, and was not bound to hold any part in trust. And by the statute of New York, it was provided that administrators with the will annexed should have the rights and powers, and be subject to the same duties, as if they had been named executors in the will. We do not, however, doubt the correctness of that decision. It is founded on the same principles which were laid down in *Wills* v. *Cowper*, 2 Ham. 124, and by C. J. Tilghman, in *Lessee of Moody* v. *Vandyke*, 4 Binn. 31, and by C. J. Savage, in *Judson* v. *Gibbons*, 5 Wend. 224.

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According to these authorities and principles, we are of opinion that the deed, from the administrator of the goods and estate of Ephraim Copeland, was without authority, and void as against his heirs. The administrator had no power to sell by the will; for that was a trust power expressly given to Jonas Tucker, and a part of the proceeds of the sale was to be held by him in trust, which might continue for an indefinite time after the debts of the deceased should be paid, and his duties *qua* executor should be fully performed. A personal confidence was reposed in the executor and trustee, to sell such property "as would most promote the interest of all concerned." Land was also given to the executor in trust for other purposes. So that it is clear he was both trustee and executor, under the will; and the power to sell, being coupled with a trust, has not been relinquished. The administrator therefore had no power to sell under the will, and he had no power under the statute. If he had obtained license to sell, the sale might be valid; but in such case, after the payment of debts, the surplus should be paid over to the trustee named in the will.

This view of the case is not inconsistent with any of the cases cited by the tenant's counsel. In the case of *Farwell* v. *Jacobs*, 4 Mass. 634, it was decided that a direction in a will to the executor, to support the testator's father, is a legacy for which an action lies against the executor, and that the duties of an executor devolve on an administrator *cum testamento annexo*, where the authority is not necessarily connected with a personal trust or confidence reposed in the executor. That decision was founded on the defect of chancery jurisdiction in this Commonwealth to enforce the trust, which defect has since been supplied; and it involved no question of the effect of a power to sell real estate. The case of *Hall* v. *Cushing*, 9 Pick. 395, was on a probate bond of an executor, who was both executor and trustee; and he was held liable for not investing the assets in his hands, as executor, according to the directions of the will. But if he had settled an account at the probate office, as executor, in

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which he was credited as executor, and charged, as trustee, with the trust fund, he would not have been held liable as executor. The case of *Larned* v. *Bridge*, 17 Pick. 339, is decidedly opposed to the tenant's claim. There it was held, that a power to sell land, given by will to the executrix, would not, on her renunciation of the office of executrix, devolve on the administrator with the will annexed. Without making any more particular comments on the cases cited by the tenant's counsel, I will only observe that they are all distinguishable from the present case, and are not, as we understand them, inconsistent with the principles and authorities cited by the demandant's counsel.

What remedy the administrator may have, if he has paid the debts of the deceased, and should hereafter be compelled to refund the proceeds of sale to the purchaser, is a question which the court is not now called upon to consider. Whether he can be licensed to make sale of the real estate, for the repayment of the debts he has paid, or whether Tucker may execute the power under the will, for the same purpose, or whether, if he refuses so to do, this court, as a court of equity, would cause the power to be executed, are questions upon which we express no opinion.

There is no doubt of the general principle, that where there is a power coupled with a trust, and the donee refuses the trust, a court of chancery, on the application of the *cestui que trust*, will cause the power to be executed, so far as may be necessary for the performance of the trust: on the principle of equity, that a trust is not to be suffered to fail for the want of a trustee.

Judgment for the demandant.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF MIDDLESEX, OCTOBER TERM 1847, AT CAMBRIDGE.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. SAMUEL S. WILDE, } JUSTICES.
HON. CHARLES A. DEWEY, }

ALLEN BLOOD & wife *vs.* ABIEL HAYMAN.

The St. of 1783, *c.* 36, § 17, which prescribed the form of the oath to be taken by an administrator, executor or guardian, who had obtained a legal order or license to sell real estate, did not, like *St.* 1817, *c.* 190, § 11, require that the oath should be taken before fixing on the time of sale.

Though an administrator, who obtains license to sell his intestate's real estate, cannot lawfully be himself the purchaser, either directly or indirectly, and though, if he so becomes the purchaser, the heirs of the intestate may avoid the sale, yet the estate, so sold and purchased, passes to the grantee, by the administrator's conveyance thereof, subject to be defeated by the heirs; and if it is afterwards sold and conveyed, for a valuable and full consideration, to a *bona fide* purchaser, who had no notice that it had been bought, at the administrator's sale, for the administrator's benefit, such purchaser will hold it against the heirs of the intestate.

In a suit by heirs, to recover land of which their ancestor died seized, upon the alleged ground that the sale thereof by his administrator, under a license, was fraudulent and voidable, the surety of the administrator, on his administration bond and also on the bond given by him on his obtaining license to sell, is a competent witness.

This was a petition for partition of a parcel of land in Dunstable, of which, as the petition alleged, Rachel Blood

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the female petitioner, was seized of one undivided moiety in fee, as tenant in common with the respondent.

At the trial, before *Wilde*, J. it appeared that, on the 7th of September 1807, Silas Blood conveyed to Silas Blood, jr. his son, the land in question, together with another parcel of land in Dunstable, of about one hundred and fifty acres; and that the said Silas Blood, jr. at the same time, by an instrument of the same date, in consideration of said deed, conveyed or leased the whole of said land to said Silas Blood, to hold the same during his life: That on the 7th of November 1807, said Silas Blood, jr. was married to Rebecca Lakin, by whom he afterwards had two children, viz. Rachel Blood, the female petitioner, and Silas W. Blood: That said Silas Blood, jr. died intestate, on the 5th of October 1815, leaving a widow and the two children above mentioned: That said Silas Blood, sen. died on the 6th of January 1844: That Allen Blood and Rachel Blood (the petitioners) were lawfully married; and that Silas W. Blood died before the death of Silas Blood, sen. having conveyed all his interest in the land now in question to the respondent.

The respondent, in defence, gave evidence that, on the 19th of October 1815, the said Silas Blood was duly appointed administrator of the estate of said Silas Blood, jr. and gave bond, as required by law, and on the 16th of January 1816, returned an inventory of the personal estate of his intestate, and also of his real estate, as follows: "The homestead farm of said deceased, situated in Dunstable, containing one hundred and fifty acres, more or less, subject to the incumbrance of a life lease, during the natural life of Silas Blood, father of the said Silas Blood, jr. deceased." The above estate was appraised at eleven hundred dollars.

The respondent then produced in evidence a copy of a petition of Silas Blood, as such administrator, for a license to sell real estate of his intestate, for the payment of debts, &c. presented to the circuit court of common pleas, held at Concord on the second Monday of March 1816, accompanied by a certificate of the judge of probate, stating the necessity of

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such sale, and by a writing in which the widow and minor children of said intestate gave their consent to such sale. In this petition said Silas Blood alleged as follows: "The only real estate of said intestate, known to said administrator, consists of a fee simple in remainder, expectant upon the death of said administrator, in about one hundred and fifty acres of land, being the homestead farm, so called, in Dunstable, whereon the said deceased last dwelt; which remainder expectant, as aforesaid, by the inventory of said estate is appraised at eleven hundred dollars; a partial sale whereof is impracticable."

The respondent also produced in evidence a copy of a license from said court of common pleas, at said term, to said Silas Blood, to sell and convey the whole of the real estate in said last mentioned petition described, for the reasons and purposes therein stated, upon his giving bond and taking the oath by law required, and in other respects observing the rules and directions of law, in such case made and provided: Also a copy of the bond, such as the law required, given by said administrator, and filed in the probate office, and a copy of the oath taken by him, in the form prescribed by *St.* 1783, *c.* 36, § 17, (which was admitted to be the only oath taken by him,) previously to selling said estate under said license. It appeared that this oath was taken before said administrator made sale of said estate, but not before he had fixed on the time of sale. The respondent objected, that the oath was not taken according to law, but the judge overruled the objection.

The respondent then produced in evidence a copy of said administrator's affidavit, duly filed in the probate office, from which it appeared that he gave notice of the sale of said estate, according to law: Also a deed from said Silas Blood, as such administrator, to George Johnson, dated April 5th 1817, reciting said license, and a sale at auction, on the 29th of April 1816, to said Johnson, of the real estate of said deceased, embracing the land in question, and conveying to said Johnson the fee simple in immediate remainder therein expectant upon the death of said administrator: Also a quitclaim deed thereof

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from said Johnson to said Silas Blood, dated April 5th 1817: Also a deed from said Silas Blood to Rebecca Blood, dated June 10th 1819, conveying to her the land in question: Also a deed from said Rebecca Blood to Silas W. Blood, dated June 10th 1819, conveying said land to him: And also a deed from said Silas W. Blood to said Hayman, the respondent, dated June 27th 1837, conveying to him the same land.

The petitioners insisted that they were not divested of their estate in the land in question by reason of the said administrator's deed to said Johnson. 1st. Because the administrator never obtained a license to sell said land; the license granted not including it. 2d. Because said administrator, who acted as auctioneer at the sale of the land, procured and employed the said Johnson, as his agent, to bid off the land for said administrator, and for his benefit; and that said Johnson did so bid off the same; whereby the said administrator was in fact the purchaser.

On the first point, the judge ruled, that the petition and license, taken in connexion with the inventory, gave authority, *prima facie*, to the administrator to sell the land in question.

On the second point, the judge ruled, that if said Johnson were so employed, as such agent, and did so bid off said land, and said Blood did so become the purchaser thereof, yet that these facts were immaterial, as the petitioners, being heirs at law of said Silas Blood, jr. deceased, could not avoid said sale against the respondent, if he were a *bona fide* purchaser for a valuable and full consideration. And the judge left it to the jury to find the facts stated on the second point, and also whether the respondent was a *bona fide* purchaser for a valuable and full consideration. The jury found the facts, as stated on the second point, and also that the respondent was a *bona fide* purchaser for a valuable and full consideration.

In the course of the trial, Micah Eldridge was called as a witness, by the respondent, to prove that the land in question was embraced in the inventory. It was admitted that he was surety for said Blood, on his administration bond, and on the

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bond given by him, on obtaining license to sell said rea. estate. The petitioners objected that he was not a competent witness; but he was admitted, and testified.

The jury returned a general verdict for the respondent. Judgment to be entered on the verdict, if the rulings at the trial were all correct; otherwise, a new trial to be granted.

This case was argued and decided at a former term.

Mellen & B. Russell, for the petitioners.

Farley, for the respondent.

Shaw, C. J. Petition for partition, in which the respondent denies the petitioners' title. After a verdict for the respondent, the case comes before the court on two questions reserved at the trial.

1. The first point relied upon, to show that the administrator, Silas Blood, sen. as administrator on the estate of Silas Blood, jr. the intestate, did not comply with the rules of law, and that nothing passed under his deed, is, that he did not take the oath required by law, before fixing on the time and place of sale. but only before the sale was actually made. It is to be considered that the sale was made before the passing of *St.* 1817, *c.* 190, which provided in terms, § 11, that the oath should be taken "previous to fixing upon the time and place of the sale;" but the sale, in the present case, must be governed by the preceding law. *St.* 1783, *c.* 36, § 17. The argument against the validity of the sale is founded on a supposed implication from the form of the oath. The administrator was required, by that act, to make oath in this form: "That in disposing of the estate," &c. "I will use my best skill and judgment in fixing on the time and place of sale, and that I will exert my utmost endeavors," &c. This clause is preceded by a preamble, reciting that "it sometimes happens that for want of prudent management in executors, administrators, guardians, &c. who are empowered to sell real estates, such estates are disposed of below their true value, to the great injury of heirs and creditors." The supposed implication is, that as the oath looks to the future, in regard to fixing the time and place of sale, it must be taken previously to any

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and all the acts incident to the sale. This implication would be stronger, had not the same section of the statute required, in terms, that this oath should be taken "previous to the sale." But the expression of a time within which it shall be made, controls the implication arising from a mere *formula* adapted to general use; and therefore the court are of opinion, that as the law then stood, the taking of the oath, prior to fixing on a time and place of sale, and of giving notice thereof, was not a condition precedent to the valid execution of the power.

2. The next question is this: Supposing that Blood, when he made sale of the estate of his son, under a license of court, made the purchase himself, under color of a sale to Johnson, or, what is equivalent, engaged Johnson to purchase it on his account, and if such sale was fraudulent and void as against the heirs, can they now recover it against Hayman, if he was a *bona fide* purchaser for a valuable consideration, without notice of the fraud?

We are strongly inclined to think, that within the meaning of the well known rule, that a trustee to sell cannot be a purchaser, an administrator selling under a license is such a trustee, and cannot himself directly or indirectly be the purchaser. But it is so held, for the benefit and security of the parties interested. The license is pursued; it is a good execution of the power; and the purchaser has a good right to hold against the grantor and all the world, except those beneficially entitled to the proceeds, and interested to have a sale made at the best price, and on the best terms. In their favor, and at their election, the law will avoid such sale, not because it is in fact fraudulent, but because the administrator is the only party who can and who should act for them; and he has so many means of disparaging the sale, if he has an adverse interest to subserve, and in modes which could not be detected, that the law will not subject him to the temptation of doing so, nor will it permit him to defend himself, by showing that the estate brought as good a price as could have been obtained for it from any other person. It would be

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substituting after opinions of value in the place of the test of a free, actual competition of purchasers. It is therefore a sale voidable, and not void. *Jenison* v. *Hapgood*, 7 Pick. 1, and 10 Pick. 77. *Harrington* v. *Brown*, 5 Pick. 519. *Litchfield* v. *Cudworth*, 15 Pick. 23. Being voidable only, an estate passed, by the conveyance, to the grantee, subject to be defeated by the heirs. But it appears, in the present case, that long after this voidable sale to Johnson, the estate passed, by various mesne conveyances, to the respondent. It was then left as a fact to the jury to consider whether the respondent took the estate for a valuable and full consideration, and without notice of the fact that it had been purchased in, at the administrator's sale, for the administrator himself; and the jury found that he did.

The court are of opinion, therefore, that the respondent acquired a good title, by such conveyance, though it might have been avoided by a suit against the first grantee, or one taking under him, with notice of the defect. *Somes* v. *Brewer*, 2 Pick. 184. 4 Kent Com. (5th ed.) 464.

A point was made at the trial, on the objection of the petitioners to the competency of Micah Eldridge as a witness for the respondent, on the ground that he was a surety on the administrator's bonds. We cannot perceive, without some further fact connecting him with the parties in this suit, how he was interested in the result of this action, or how the judgment in this suit can subject him to a suit, or exempt him from one, on his bonds.

Judgment on the verdict for the respondent.

ALLEN BLOOD & wife *vs.* DAVID RIDEOUT.

On the trial of a real action, after the demandant had given evidence tending to show that the tenant's deed of the demanded premises was not given to him on any pecuniary consideration, the tenant offered in evidence his attested note, given to his grantor a few weeks after the execution of the deed, and the testimony of the attesting witness, that when the note was given, he understood

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eout was about to marry his daughter; Blood what consideration should be d Blood said it did not make any great was $1500 or $2000, and the witness the witness asked Blood who was to which the Groton Fund had on the farm, him to make the deed free and clear of all that "no money was paid or spoken about at thing of value, except a life lease;" that led on the witness to write the deed, he said to write a deed and a life lease; that the wit- wrote a life lease from the tenant (Rideout) described in said deed, to said Blood and his at the same date as that of the deed, viz. 1826.

unt then introduced (among other evidence) the note: "Dunstable, November 28th 1826. For ived, I promise to pay Silas Blood, or order, the even hundred dollars, within seven years, to be paid dred dollars yearly, without interest.

Eben. S. Burge. David Rideout."

the back of this note were indorsements of seven yearly nts, according to its tenor.

ne deposition of said Burge was then introduced, in ch he deposed as is hereinafter stated in the opinion of the rt.

The demandants objected to this testimony, as hearsay, but the judge admitted it to be read to the jury.

The demandants, in order to show that there was an agreement between Blood and Rideout, that Rideout should pay Blood the sum of seven hundred dollars, in full satisfaction for said Blood's life estate in the land thus conveyed, and that said note was given for that purpose only, and not for the purchase of the fee in the reversion, offered to give evidence to show, in connexion with other evidence in the case, the value of the real estate, conveyed by Blood to Rideout, in 1826, when it was conveyed. The professed object of

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from the conversation between the grantor and the tenant, that it was given on account of a mortgage on the demanded premises, and to pay the grantor's debts, and that, when the note should be paid, the tenant was to have the demanded premises. *Held*, that this evidence was admissible, as part of the *res gesta*.

A. conveyed land to B., reserving to himself a life estate therein: B.'s reversion was sold after his decease, and A. afterwards became the grantee thereof: A. then conveyed a part of said land, together with other land, to R. in fee, for the alleged consideration of $2000, and R. at the same time gave back a lease to A. of all the land so conveyed, for A.'s life: In a real action, brought by B.'s heirs, to recover of R. the land that once was B.'s, one question was, whether R. paid any pecuniary consideration therefor: R. gave in evidence a note given by him to A. for $700, and also introduced evidence tending to show that the note was given in payment for the land conveyed to him by A. *Held*, that B.'s heirs could not give evidence of the value of the land, at the time when A. conveyed it to R. for the purpose of warranting the jury to infer that said note was given for A.'s life estate, and not for the whole fee simple.

This was a writ of entry, to recover a parcel of the estate which was sold by Silas Blood, sen. administrator of the estate of Silas Blood, jr. as is fully stated in the next preceding case of *Blood & wife* v. *Hayman*, (*ante*, 231.) The present case was tried before *Shaw*, C. J. and the demandants proceeded on the same ground as in the preceding case, namely; *first*, that the sale made by said Blood, as administrator of the estate of his son, Silas Blood, jr. under a license, was void, because the estate was, in effect, purchased for himself; and *secondly*, that the sale by him to Johnson was merely colorable.

The tenant gave in evidence, and relied on, a deed of warranty from Silas Blood, sen. dated November 3d 1826, conveying to the tenant, in consideration of $2000, the demanded premises, together with about thirty three acres of other land, and witnessed by Edmund Page and Jonathan Woodward, jr.

To sustain the first of their grounds of claim, above stated, the demandants introduced evidence; and the tenant introduced counter evidence. The whole evidence on this point was submitted to the jury, with instructions, to which the demandants did not except.

To sustain their second ground of claim, the demandants called Edmund Page as a witness, who testified that he wrote and witnessed the aforesaid deed of November 3d 1826; that said Blood requested him to write it, and said that he was going to give Rideout (the tenant) the farm, or

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let him have it, as Rideout was about to marry his daughter; that the witness asked Blood what consideration should be inserted in the deed, and Blood said it did not make any great difference whether it was $1500 or $2000, and the witness inserted $2000; that the witness asked Blood who was to pay the mortgage which the Groton Fund had on the farm, and Blood told him to make the deed free and clear of all incumbrances; that "no money was paid or spoken about at the time; nor any thing of value, except a life lease;" that when Blood called on the witness to write the deed, he said he wished him to write a deed and a life lease; that the witness afterwards wrote a life lease from the tenant (Rideout) of the same land described in said deed, to said Blood and his wife, and gave it the same date as that of the deed, viz. November 3d 1826.

The tenant then introduced (among other evidence) the following note: "Dunstable, November 28th 1826. For value received, I promise to pay Silas Blood, or order, the sum of seven hundred dollars, within seven years, to be paid one hundred dollars yearly, without interest.

Attest: Eben. S. Burge. David Rideout."

On the back of this note were indorsements of seven yearly payments, according to its tenor.

The deposition of said Burge was then introduced, in which he deposed as is hereinafter stated in the opinion of the court.

The demandants objected to this testimony, as hearsay, but the judge admitted it to be read to the jury.

The demandants, in order to show that there was an agreement between Blood and Rideout, that Rideout should pay Blood the sum of seven hundred dollars, in full satisfaction for said Blood's life estate in the land thus conveyed, and that said note was given for that purpose only, and not for the purchase of the fee in the reversion, offered to give evidence to show, in connexion with other evidence in the case, the value of the real estate, conveyed by Blood to Rideout, in 1826, when it was conveyed. The professed object of

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the proof, thus offered, was that which is hereafter stated in the opinion of the court. The judge refused to admit the evidence.

A verdict was returned for the tenant, on the second point in the case, to wit, that the tenant purchased the estate for a valuable consideration, without notice of the supposed fraud in the administrator's sale. New trial to be granted, if either of the foregoing rulings was wrong; otherwise, judgment to be rendered upon the verdict.

B. Russell, for the demandants.

Farley & Wentworth, for the tenant.

Shaw, C. J. At the time when the preceding case of *Blood & wife* v. *Hayman*, (*ante*, 231,) was decided, the present case was pending, brought by the plaintiffs against another defendant, David Rideout, to recover another parcel of the same estate. This case proceeded on the same ground as the other, to wit, that the sale made by Silas Blood, sen. under license as administrator, was void, and that his deed to Johnson was merely colorable.

Two grounds of defence were taken by the tenant. 1st. That the purchase made by Johnson was a real and actual sale to him, and not colorably made for the account of the administrator. 2d. That the tenant was a purchaser for a valuable consideration, and without notice of the alleged fraud, or other defect in the title of Silas Blood, sen.

On the first ground, the evidence was left to the jury, with directions not objected to.

Upon the second ground, it appeared that the estate in question, claimed by the demandants as having been their father's, so sold under a license to pay his debts, was a reversion expectant upon the decease of his father, Silas Blood, sen. the administrator. When, therefore, Silas Blood, sen. took a conveyance from Johnson of this reversion, being himself tenant for life, the two estates merged, and he became tenant in fee; supposing the conveyance to him of such reversion was valid. Subsequently, he transferred this estate, as an estate in fee, to the tenant, David Rideout, (who married his

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daughter,) together with some other estate, by a deed purporting to be made on a valuable consideration, and took back a lease of certain rights to himself and wife, for life.

Some evidence having been offered, tending to show that when the deed was made, no money was paid, and generally to show that no pecuniary consideration was paid by the tenant for the land, the tenant offered evidence tending to control and rebut the foregoing, and for that purpose gave in evidence a note from himself to said Blood, sen. for $700, bearing date a few weeks later than that of the deed, and purporting to be attested by Ebenezer S. Burge. Burge's deposition was offered, to prove that he was called into Blood's house to attest the note; that Rideout was there, and acknowledged the note to have been signed by him, and that the witness, at the request of Blood, and in the presence of Rideout, attested it. He further testified, that he understood from conversation, at the time, between Blood and Rideout, that the note was given "on account of a mortgage, and to pay up Blood's debts; and that when Rideout had paid this note, he was to have the farm where he now lives." This testimony was objected to as hearsay, but was admitted as *res gesta*.

The court are of opinion that this evidence was rightly admitted. The occasion was the one at which the note was completed as the parties intended to have it, and the declarations of the parties, made at the time, showing the purpose for which it was given, qualified the act of executing and delivering the note.

The demandants, in order to show that there was an agreement between Blood and Rideout, that Rideout should pay the sum of $700 for said Blood's life estate in the land thus conveyed, and that said note was given for that purpose only, and not for the purchase of the fee of the estate, including the original reversion held by Silas Blood, jr. offered evidence of the value of the whole real estate, thus conveyed by Blood to Rideout, in 1826, at the time of that conveyance. The object of this proof, as stated by the demandants' counsel, was to show, by inference, that the $700 was paid by Rideout to

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Blood, for the purchase of his life estate, newly created by the lease given to him by Rideout, bearing even date with the conveyance from himself to Rideout, and so lead the jury to infer, that the original estate, in which Silas Blood, jr. had formerly a reversion, was conveyed without consideration But the judge who tried the cause was of opinion, that the evidence of the value of the whole estate was immaterial and inadmissible, on several grounds.

The deed purported to convey an entire estate, consisting of the estate in question, and other real estate, for one entire pecuniary consideration. And further; *prima facie* the estate, of which Blood, sen. originally had a life estate, and Blood, jr. a reversion, had become, by merger, an absolute estate in fee, in Blood, sen.; and, for this or other cause, no distinction was made, between such original life estate and reversion, by the parties, in their deed. And the life estate then held by Blood, sen. under the lease from Rideout, was wholly distinct from the former life estate held by himself, which had the reversion. Under these circumstances, the value of the whole estate had no tendency to show, that the grant of that part of the estate, of which the demandants' father once had a reversion, by Blood, sen. to Rideout, was gratuitous, and without pecuniary consideration. This being the only purpose for which the evidence was offered, it was rejected.

If any evidence of this kind was admissible to control the terms and legal effect of the deed, we are of opinion, that the evidence of the estimated value of the land, at the time of the conveyance, was too remote and uncertain to warrant the jury in drawing the inference, that the consideration was partly gratuitous and partly pecuniary, and that the gift applied to that part of the estate which was claimed by the demandants, and the pecuniary payment was applicable exclusively to the other part of the estate. It had no tendency, either by itself or with other evidence, to lead to such a conclusion, and therefore the evidence was immaterial, and rightly rejected.

Judgment on the verdict for the tenant.

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John Vose *vs.* Phineas How.

When a matter, not pending in court, is submitted to arbitration, by an agreement *in pais*, and not pursuant to the Rev. Sts. *c.* 114, and no provision concerning costs is made in the agreement, the arbitrators have no authority, by the common law, or by the revised statutes, to award costs of arbitration.

Debt on an award. At the trial in the court of common pleas, before *Wells*, C. J. the plaintiff gave evidence that he and the defendant submitted a matter in dispute between them to the arbitration of two men. This submission was not made before a justice of the peace, under the Rev. Sts. *c.* 114, but was in the following form: "We the subscribers, John Vose, jr. and Phineas How, do hereby promise and agree to refer to [two persons named] all matters of dispute in reference to a contract or bargain of said How to purchase of said Vose a receipt to make composition for glazed hats, and that we will abide their decision. Phineas How,

Haverhill, March 7th 1845. John Vose, jr."

The plaintiff also gave in evidence the award of said arbitrators, the conclusion of which was thus: "We therefore do determine and award that said Phineas How pay to the said John Vose, jr. the sum of one hundred fourteen dollars and eighty cents, and the costs of this reference, taxed at eighteen dollars and forty two cents."

The defendant contended that the arbitrators had no authority, under the above submission, to award the costs of arbitration. But the judge ruled otherwise, and a verdict was returned for the plaintiff for the full amount of the award, including the costs. The defendant filed exceptions to the judge's ruling.

J. G. Abbott, for the defendant, cited and relied on *Peters* v. *Peirce*, 8 Mass. 398.

Nelson, for the plaintiff. The common law, upon which *Peters* v. *Peirce* was decided, has been altered by the Rev. Sts. *c.* 114, § 12, which enact, that "if there is no provision in the submission, concerning the costs of the proceedings

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the arbitrators may make such award respecting the costs as they shall judge reasonable, including therein a compensation for their own services." By Rev. Sts. *c.* 121, § 21, it is provided that "nothing contained in this chapter shall take away or control the power of arbitrators or referees, appointed by a rule of court *or otherwise*, from making such award concerning costs as justice and equity shall require." It was on this provision that the judge below founded his ruling.

Abbott, in reply. The provision cited from Rev. Sts. *c.* 114, § 12, applies only to submissions before a justice of the peace. That whole chapter relates exclusively to such submissions, and the awards under them. And Rev. Sts. *c.* 121, § 21, confer no new power on arbitrators, but merely save to them the power of awarding full costs, if they deem them just, when they have authority to award costs at all, instead of confining them, as the courts are confined by that chapter, to costs amounting only to one quarter of the debt or damage.

Shaw, C. J. The single question in this case is, whether under an agreement of arbitrament at common law, not entered into before a magistrate, pursuant to the Rev. Sts. *c.* 114, the arbitrator has authority, without some provision to that effect in the instrument of submission, to award costs of arbitration. There are conflicting authorities; and if the question were one of practical importance, it would be useful to go into a full review of them. By the common law of England, we think it clearly settled, that arbitrators have not that power.

Under a rule of court, the matter is regulated by the rule, founded as here, on the consent of parties. So all matters in difference may include costs of a cause pending. But the question is, of a submission *in pais* when there is no cause pending.

At one time it was considered that an authority to award on the subject of costs did not include costs of arbitration, but only costs of court. *Bradley* v. *Tunstow*, 1 Bos. & Pul. 34. Afterwards it was held to include costs of reference. *Wood* v. *O'Kelly*, 9 East, 436.

But the question is, when no authority is given in regard

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to costs, and when no cause is pending, as to the costs of arbitration. Instead of citing the authorities, we will refer to the two most recent digests of good reputation. 2 Petersd. Ab. 254. 1 Steph. Nisi Prius, 148. We think the law in Massachusetts, in this respect, has followed the law of England. *Peters* v. *Peirce*, 8 Mass. 398.

We are aware that a different rule has prevailed in several of the other States. Perhaps it arose at first from not considering the distinction between costs of the cause pending, which are matters in difference, and costs of the arbitration. The case of *Roe* v. *Doe*, 2 T. R. 644, is sometimes cited to support the general proposition that an arbitrator may award costs without any express authority. And the marginal note, and perhaps the report itself, being very brief, countenances that proposition. But this case is commonly cited to mark the distinction between the authority of the arbitrator over the costs of the cause and the costs of the arbitration. *Candler* v. *Fuller*, Willes, 62, and the note, on page 64, of Mr. Durnford, one of the reporters of *Roe* v. *Doe*, citing that case. This was the authority relied on in the early case, in New York, of *Strang* v. *Ferguson*, 14 Johns. 161. The decision in *Alling* v. *Munson*, 2 Connect. 691, was not by a unanimous opinion, and was founded mainly on the ancient usage in the State of Connecticut. Such also is the usage in New Hampshire. *Spofford* v. *Spofford*, 10 N. Hamp. 254.

Notwithstanding the weight of these authorities, this court are disposed to abide by the rule, as they believe it has been judicially settled in this Commonwealth, that without special authority, arbitrators under an agreement *in pais*, where no cause is pending, have no power to award costs of arbitration. The court in Maine had this question before them, in 1830, and they adhered to the decision made here in *Peters* v. *Peirce*, while Maine was a part of this State. *Gordon* v. *Tucker*, 6 Greenl. 247.

Indeed, the learned counsel for the plaintiff seemed to consider it as settled, by the judicial decisions, that such was the law in this State, but supposed it altered, in this respect, by

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the revised statutes, and he relied upon two provisions. *First*, Rev. Sts. *c.* 114, § 12. But that provision is limited to powers of arbitrators, under a rule entered into before a justice of the peace, and does not affect the present question. *Second*, the Rev. Sts. *c.* 121, § 21, in a saving clause, in a chapter regulating costs in law and equity, provide that nothing contained therein shall take away or control the power of arbitrators or referees, appointed by rule of court or otherwise, from making such award concerning costs, as justice and equity shall require. This grants no new power to arbitrators, but was intended simply to prevent the other provisions in that chapter from restraining arbitrators and referees from awarding costs in cases where, by law or the terms of the submission, they had the power, under other provisions of the common law, or any statute. We think neither of these provisions had the effect to alter the law on this subject.

New trial granted.

SYLVIA CUMMINGS *vs.* CHARLES B. HODGDON.

Under *St.* 1839, *c.* 117, which established separate terms of the court of common pleas, in the county of Middlesex, for the transaction of civil and criminal business, a complaint, under Rev. Sts. *c.* 49, by the mother of a bastard child, against the alleged father, must be entered and proceeded with at a term held for the transaction of criminal business.

THIS was a complaint against the respondent, under the Rev. Sts. *c.* 49, which provide for "the maintenance of bastard children." The respondent was examined before the police court of Lowell, on the 26th of September 1846, and was ordered, by said court, to give a bond, with sureties, for his appearance at the court of common pleas, then next to be holden at Lowell, on the third Monday of October 1846, then and there to answer to the accusation set forth in said complaint. Thereupon a bond was given accordingly, by the respondent, and this complaint was entered at said term, when the respondent appeared by his attorney, and made a written

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motion that the complaint might be dismissed for want of jurisdiction in the court; the court, at said term, having jurisdiction of criminal business only; whereas the respondent ought to have been ordered to appear at the term of said court, for civil business only, on the second Monday of December 1846. The court ordered the complaint to be dismissed, and the complainant alleged exceptions to the order.

Caverly, for the complainant.

B. F. Butler, for the respondent.

SHAW, C. J. This is a prosecution under the bastardy act, (Rov. Sts. c. 49,) and the question is, whether it should have been entered and prosecuted at the court of common pleas for this county, held for criminal business, or that held for civil business.

This division of the terms of the court of common pleas for the county of Middlesex was established by *St.* 1839, c. 117. By § 1, several additional terms were established "for the disposition of the criminal business of said county." By § 2, it was provided that all appeals, recognizances and processes, and every other matter and thing of a criminal nature, which would have been returnable at the succeeding term at Concord, should be returnable to, and have day in court at, the next term thus established for criminal business. By § 3, all civil business of the court of common pleas for the county was required to be transacted *only* at the terms before established. And it was required that the criminal business should be acted upon *only* at the terms appointed by said act to be holden. And all continuances, without any special order, were directed to be from any criminal term to the next criminal term, and from any civil term to the next civil term.

Thus it appears to have been the purpose of the legislature to make an entire division of the business, as if there had been distinct courts, to be held by distinct judges.

In point of fact, the complaint, in the present case, was entered at a criminal term. A motion was made to dismiss the suit for that cause, on the ground that it should have been

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entered at the term held for civil business. This motion was sustained, and the suit, by order of the court, was dismissed. To this order the complainant excepted, and the exception was allowed. The question is, whether the suit was rightly entered; and this depends upon another, which is, to which of the above classes, civil or criminal, this proceeding belongs.

Proceedings under the bastardy laws are exceedingly anomalous. They partake partly of a civil and partly of a criminal character. The matter is very fully discussed, and satisfactorily stated, in *Hill* v. *Wells*, 6 Pick. 104, the authority of which is not to be questioned; and it goes far to decide the present case. A previous act, *St.* 1799, *c.* 81, passed March 4th 1800, had transferred the criminal business in the town of Boston to the municipal court; and the supreme judicial court held, in that case, that this statute, transferring the criminal business to that court, transferred the jurisdiction of the court of sessions in bastardy cases. One strong consideration is, that prior to 1800, the jurisdiction in bastardy was vested in the court of sessions, which was exclusively a court of criminal jurisdiction, with some administrative functions; but the court of common pleas was a court exclusively of civil jurisdiction. So it remained, with the exception of the municipal court already stated, till the whole system was changed by *St.* 1803, *c.* 154. By this act, all the judicial powers of the court of sessions in criminal matters was transferred to the court of common pleas, and nothing remained to the court of sessions but the subject of roads, licenses, taxes, and other administrative management of the prudential affairs of the county. This transfer of criminal jurisdiction did not extend to Boston, because that had been already transferred to the municipal court. After this act of 1803 passed, all jurisdiction, both civil and criminal, being vested in the court of common pleas, in other counties than Suffolk, that court had jurisdiction in cases of bastardy, whether it belonged to the one or the other of these classes; and no question could arise on the subject, except in Suffolk until the above act, dividing the business of the court of

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common pleas for the county of Middlesex. Upon the authority, and for the reasons given, in the case of *Hill* v. *Wells*, the court are of opinion — being obliged to determine whether the proceeding in bastardy is civil or criminal — that it belongs to the class of criminal proceedings.

The fact, that the unquestioned jurisdiction, for a long series of years, was in a court of exclusively criminal jurisdiction, and was so continued until the whole criminal jurisdiction was transferred to a court having previously civil jurisdiction, is a consideration of great weight.

The commencement of the proceeding in bastardy is by a complaint to a magistrate, a warrant, an arrest, an examination, and a commitment to jail, unless the party accused shall give bond to appear and answer, and abide the order of the court; which bond shall remain in force from term to term until a final judgment. Rev. Sts. *c.* 49. That judgment is not a simple decree for the payment of money to the complainant; but, upon a conviction, the respondent is to be adjudged the father of the child, and shall stand charged, &c. and shall give bond, with sureties, to perform the order and to indemnify and save harmless any town which might be chargeable with the maintenance of the child. This adjudication is not to be carried into effect by an execution, like a judgment in a civil action, but he shall be committed to jail until he give such bond. And a man committed for a failure to comply with such order, and who shall have been imprisoned ninety days, may have the benefit of the poor debtors' oath; but he must give thirty days' notice, both to the complainant and to the town; and if the complainant be dead, he must still give notice to the town. It was intimated, in the case of *Hill* v. *Wells*, that a defendant, when committed for a failure to comply with the order of court, could not be discharged on taking the poor debtors' oath. The revised statutes do provide for such a discharge. Those statutes were indeed passed after that judgment was given; but they followed, in this respect, the provisions of *St.* 1825. *c.* 173, passed March 4th 1826, to which the attention

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of the court, probably, was not drawn. But it equally well supports the argument, that the mode of taking the poor debtors' oath is entirely different from that provided for a discharge from imprisonment on execution, on a judgment in a civil case.

It is also stated in the case of *Hill* v. *Wells*, that a town has no remedy, unless the complainant voluntarily prosecutes That is true. The town can have no remedy unless she voluntarily prosecutes; but when she does voluntarily prosecute to a conviction and order of filiation, then the town has a remedy on the bond, if one be given, or on the order of court requiring such bond, and the order of commitment, if he fail to give such bond. And after such a discharge, both the complainant and the town have a remedy by an action of debt. Rev. Sts. *c.* 49, §§ 5, 6.

Although, therefore, the prosecution must be commenced by the mother, and the principal object is her relief, and in that respect the prosecution partakes of the character of a civil suit, yet because it originates in a transaction which the law deems criminal, and has been prosecuted in a court of criminal jurisdiction, we are of opinion that that branch of the jurisdiction of the court of common pleas, by the statute in question, was properly vested in the court having criminal jurisdiction, and that this complaint was properly entered there.

It was stated, in the argument, to be now the practice, in the county of Suffolk, to carry these proceedings, not into the municipal court, but into the court of common pleas; but no case has been cited. But if it is so, as we are inclined to think it is, we think it is by force of the Rev. Sts. passed since the decision in *Hill* v. *Wells*. It is competent for the legislature to commit this jurisdiction to any competent court; and we see they have heretofore transferred it, in other counties, to the court of common pleas. By the Rev. Sts. *c.* 49, § 1, this jurisdiction is committed generally, without distinction of counties, to the court of common pleas. This would transfer the jurisdiction from the municipal court to the court of common pleas, if there is nothing in the revised statutes, or in

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some subsequent statute, to control it. We have already seen that when *Hill* v. *Wells* was decided, in 1828, the jurisdiction was in the municipal court.

The case of *Jordan* v. *Lovejoy*, 20 Pick. 86, came before this court in March 1838, being debt on a bastardy bond given with condition to appear at the municipal court. No question was then made, whether that court had jurisdiction in bastardy; but on recurring to the facts, it appears that the proceedings took place in the municipal court, in 1834, before the revised statutes, and therefore does not affect this question. It would seem then that, by force of the express provision in the revised statutes, the jurisdiction in this class of cases, in Suffolk, is now vested in the court of common pleas. But if it be so, of which we give no opinion, it does not affect this case. The question does not depend on general reasoning, but upon statute provisions. And the only question is, under what class of the two departments of the court of common pleas in Middlesex, bastardy falls; and, for the reasons given, we think it is the criminal.

Order dismissing this suit set aside, and case remanded to the next term of the court of common pleas for criminal business.

PETER BANNEGAN *vs.* PATRICK MURPHY.

The police court of Lowell is a court of record, within the meaning of the Rev. Sts. c. 120, § 1, and actions on its judgments are not barred by the six years' limitation.

DEBT on a judgment of the police court of Lowell, rendered against the defendant, in favor of the plaintiff, on the 16th of January 1838. Writ dated August 24th 1844. Defence, the statute of limitations.

The parties agreed that if the court should be of opinion that the police court of Lowell is such a court of record, that actions on its judgments are not barred by the lapse of six

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years from the rendition of such judgments, then the plaintiff should have judgment in this action; otherwise, that judgment should be rendered for the defendant.

Knowles, for the plaintiff. By the Rev. Sts. *c.* 120, § 1, "all actions of debt, founded upon any contract, or liability not under seal, except such as are brought upon the judgment or decree of *some court of record* of the United States, or of this or some other of the United States," must "be commenced within six years next after the cause of action shall accrue, and not afterwards." The question, whether the police court of Lowell is a court of record, was settled in the case of *Gladhill, Petitioner*, 8 Met. 168.

After the passing of the revised statutes, the question arose, whether a justice's court was a court of record. *Smith* v. *Morrison*, 22 Pick. 430. The court decided that an action on a justice's judgment was barred, after the lapse of six years, by virtue of *St.* 1839, *c.* 73, whether a justice's court was, or was not, a court of record. But that statute does not apply to judgments of police courts; it is confined to courts of justices of the peace.

B. F. Butler & Farr, for the defendant. The court, in the case of *Gladhill, Petitioner*, 8 Met. 168, decided nothing more than that the police court of Lowell was a court of record, "coming within the description, in the act of congress," which defines a court of record for the purposes of naturalization. It was thus settled that said court is a court of record for certain purposes. But the court say, in that case, "probably the result may be, from an examination of all the statutes regulating the jurisdiction of *justices of the peace*, that *their* courts will be regarded, to some purposes, as courts of record, but not in all respects."

It is admitted by the plaintiff's counsel, that a justice's court is not one of record, in which a judgment will survive more than six years. But the police court of Lowell has precisely the same jurisdiction as justices of the peace, and concurrently with them, to a great extent. Rev. Sts. *c* 87, §§ 34, 40. Having the same extent of jurisdiction, why

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should the judgment of the one have any greater effect than that of the other? Each is a court of record, for certain incidental purposes; the one, it is settled, is not a court of record, within the exception in Rev. Sts. c. 120, § 1; and why should the other be?

Shaw, C. J. The only question in this case is, whether an action on a judgment of the police court of Lowell is barred by the six years' limitation, in Rev. Sts. c. 120, § 1, or whether it is the judgment of a court of record, saved by the statute, and barred only in twenty years.

The court are of opinion that the police court of Lowell is a court of record, and has a jurisdiction different from that of a justice of the peace.

The *St.* of 1839, *c.* 73, which was designed to remove doubts in regard to the limitation of actions on judgments of justices of the peace, and fix it at six years, was confined, in terms, to cases of justices of the peace.

Judgment for the plaintiff

George W. Baldwin *vs.* James B. Gregg.

When a defendant withdraws his specification of defence, and goes to trial on the general issue alone, neither the fact of his having filed and withdrawn the specification, nor the averments contained in it, can be given in evidence, or taken into consideration by the jury, for any purpose.

Trespass for an assault, battery and false imprisonment. The defendant pleaded the general issue, and filed a specification of defence, containing the matter hereinafter mentioned.

At the trial in the court of common pleas, before *Wells*, C. J. the defendant, by leave of the court, withdrew his specification of defence, as matter of justification, admitted the assault, &c. and proposed to go to the jury upon the question of damages; stating that he should rely upon proof of the statement made in said specification, in mitigation of damages. Both

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parties introduced witnesses to show the circumstances under which the assault and battery, and the alleged false imprisonment, were committed. The testimony was conflicting; that of the plaintiff's witnesses representing the assault as violent, and accompanied with a charge that the plaintiff had stolen the defendant's dog; and that of the defendant's witnesses representing the assault as trifling and unaccompanied with any such charge. The counsel for the defendant, in his address to the jury, contended that no charge of larceny was made by the defendant, and that, from the evidence, it appeared that the plaintiff was a person whose feelings could not be injured by the treatment which he received from the defendant. The counsel for the plaintiff, in his closing address to the jury, alluded to the specification of defence, as evidence in the case, and argued that the allegation therein contained, and especially the implied, if not direct, charge on the plaintiff, of having stolen the defendant's dog, and the fact that the defendant had thus made this imputation on the plaintiff's character, in writing, tended to show that he had originally charged the plaintiff with stealing, and was evidence of malice. The defendant's counsel objected to this course of argument, and contended that the specification was no longer in the case, for any purpose, and could not be used as evidence on the question of damages.

The judge ruled, that the fact, that the specification had been filed, and the fact that it had been withdrawn, were both properly in evidence, and he instructed the jury, that in estimating the damages, they might consider the filing and the withdrawing of the specification, and give to those facts such weight as they were entitled to receive; that if the specification was filed in good faith, for the purpose of enabling the defendant to present his defence properly to the court and jury, and was withdrawn, on his being satisfied that it was not necessary or proper to file it for that purpose, then the fact of its having been filed and withdrawn should not be allowed to aggravate the damages; but if the jury should be satisfied that the specificatior was filed with a design to disgrace the

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plaintiff, injure his feelings, or prejudice his case — the defendant knowing, at the time, that the statements made in it could not be proved, or, if proved, would constitute no ground of defence — then the filing of the specification, with such a design, would be a fact which the jury might take into consideration, both as furnishing evidence of malice, and of the purpose for which the assault, battery and false imprisonment were committed; that the presumption was, that the specification was filed in good faith and for a supposed lawful purpose, and that the burden of proving that it was done maliciously, or for an improper purpose, was on the plaintiff.

The jury found a verdict for the plaintiff, and the defendant alleged exceptions to the foregoing ruling and instructions.

Buttrick, for the defendant.

E. R. Hoar, for the plaintiff.

Shaw, C. J. The court are all of opinion, that the fact of the defendant's having filed and withdrawn a specification of defence could not be given in evidence, or taken into consideration by the jury, either in establishing the malice of the defendant, or in estimating the damages. The pleadings are usually filed by the attorneys; and they are filed with a view of laying the merits of the respective parties before the court, in a technical form, and can hardly be considered as the act of the parties. It is not competent for the jury to hear evidence, and inquire and decide whether a specification of defence was filed *bona fide* or *mala fide*. A bill of particulars filed by a plaintiff, or a specification of defence filed by a defendant, is usually a formal document, drawn up by counsel, after some examination of his client's case, and is made broad enough to cover all which the party can expect, in any event, to prove; and in most instances, probably, is not seen by the party in whose behalf it is filed.

But the statute is decisive. By the Rev. Sts. *c.* 100, § 18, "when a defendant shall plead two or more pleas in defence, no averment, confession or acknowledgment, contained in any one of such pleas, shall be used or taken as evidence

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against him, on the trial of any issue joined on any other of the same pleas." The specification is in the nature of a plea, and is substituted for it. No "averment" contained in it shall be used as evidence. It is in the nature of a privileged communication. It is a statement, submitted to a court of competent jurisdiction, and which is to be heard and decided upon by the court.

If it be true, that no averment, confession or acknowledgment, made by a party in one plea, shall be used as evidence against him, on the trial of any other on the same record, *a fortiori* shall it not be so used, after it is withdrawn by leave of the court. The case then stands as if no specification had been filed. *Prescott* v. *Tufts*, 4 Mass. 146. The fact that a specification of defence had been filed, and by leave withdrawn, without resorting to the paper itself, to ascertain what averments it contained, would prove nothing. If, therefore, it were admitted as proof, it would be to use those averments as evidence; which is prohibited by the statute.

Verdict set aside, and a new trial granted

CHARLES SHIRLEY *vs.* SUMNER SHATTUCK.

The provisions in Rev. Sts. *c.* 92, §§ 12, 13, that when service is made on part only of the defendants who are jointly sued on a contract, the suit may proceed against those on whom service is made, and that the judgment recovered in such suit, while it remains unsatisfied, shall not be a bar to a subsequent suit brought against the other joint contractors, apply as well to a judgment recovered in another State, as to a judgment recovered in this Commonwealth.

By virtue of St. 1836, *c.* 273, which prohibits special pleas in bar, and allows all matters of defence to be given in evidence under the general issue, a defendant may give in evidence any matter set forth in his original specification of defence, although he files and also relies on another specification *puis darrein continuance*; such second specification not being a waiver of the first: The effect of that statute is, to give a defendant the right to prove all matters existing at the time of the trial, which may be effectual in law to bar the plaintiff's action.

THIS was an action on a bond, joint and not several, executed on the 23d of April 1845, by Josiah K. Bennett, as

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principal, and Sumner Shattuck, the defendant, as surety, conditioned for the performance, by Bennett, of an award of arbitrators, to whom he and the plaintiff had submitted all matters in difference between them. The original writ, in this case, was issued against the defendant and said Bennett; but the officer made return that he could not find said Bennett in his precinct, nor any property of his, and therefore made no service upon him. At the return term, the plaintiff filed a bill of particulars of his claim under said bond; to wit, the non-performance of the award of arbitrators, as mentioned in the condition of the bond. The defendant, after having oyer of the bond, pleaded the general issue, and filed a specification of the matter which he proposed to give in evidence, in avoidance or discharge of the plaintiff's cause of action. After several continuances, the defendant, by leave of court, (the plaintiff objecting,) filed a further specification of matter of defence, which had happened since the last continuance.

At the trial in the court of common pleas, before *Wells*, C. J. at December term 1846, the execution of the bond, the hearing before arbitrators, their award, and Bennett's refusal or neglect to perform it, were admitted. The defendant then offered to give evidence of the matter stated in his first specification of defence; but the plaintiff objected, and the judge excluded the evidence, on the ground that the defendant was precluded from giving such evidence, by his filing of a second specification, and relying on it in his defence.

The defendant then gave in evidence, under his second specification of defence, a copy of a writ, dated September 29th 1845, returnable to the court of common pleas to be held at Manchester, in the county of Hillsborough, in the State of New Hampshire, on the fourth Tuesday of October 1845, wherein the said Bennett and Shattuck were jointly impleaded, by the present plaintiff, in an action of debt, founded on the same bond, and for the same cause of action that is embraced in the plaintiff's bill of particulars in the present case. And it appeared from the officer's return, indorsed on said writ, that he made service thereof on said

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Bennett, but that he could not find, in his precinct, either said Shattuck or any of his property. In connexion with said writ and return, the defendant gave in evidence an authenticated copy of the proceedings of said court in New Hampshire, in said action, from which it appeared that said action was duly entered at the return term of said writ, and was continued, from term to term, until the term of said court held at said Manchester, on the fourth Tuesday of October 1846, (which was since the last continuance of the present action,) when and where the said plaintiff recovered judgment against said Bennett for the sum of $149·05 damages, and $18·57 costs. The defendant's counsel contended that said judgment, thus recovered, was a bar to a recovery in this action against him. But the court ruled otherwise, and the plaintiff obtained a verdict. The defendant filed exceptions to the judge's ruling.

It was admitted, at the argument, that at the time of the execution of the bond in suit, and at the time of the trial, Bennett was an inhabitant of New Hampshire, and the defendant an inhabitant of this Commonwealth.

B. Russell, for the defendant. The judgment in New Hampshire, against Bennett, is a bar to this suit. *Ward* v. *Johnson*, 13 Mass. 148. *King* v. *Hoare*, 13 Mees. & Welsb. 494. *Pierce* v. *Kearney*, 5 Hill, 82, and cases there cited. *Williams* v. *McFall*, 2 S. & R. 280. *Willings* v. *Consequa*, Peters C. C. 301. *Downey* v. *Farmers & Mechanics Bank of Greencastle*, 13 S. & R. 288.

The Rev. Sts. c. 92, §§ 12, 13, which provide that actions on contract, brought against several defendants, where service is made only on part of them, may proceed against those on whom service is made, and that the judgment recovered against one or more of several joint contractors, while unsatisfied, shall not bar an action against the other contractors, relates only to actions brought and judgments recovered thereon in this Commonwealth. Besides; the present action, if within the letter of the statute, is not within its spirit and reason.

The ruling, as to evidence under the first specification

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cannot be sustained. The old rule on this subject is entirely changed by *St.* 1836, *c.* 273.

Farley, for the plaintiff. The judgment in New Hampshire is no bar to this action. The case of *Ward* v. *Johnson*, 13 Mass. 148, is not like this case, and the reason given for that decision does not apply here. There a judgment against one of two joint contractors was held to be a bar to a suit against both. In the present case, a judgment is sought against each severally; thus merely severing a joint contract.

This point is adjudged in the plaintiff's favor, in *Dennett* v. *Chick*, 2 Greenl. 191, and in *Olcott* v. *Little*, 9 N. Hamp. 259. And the law of these cases was the law of this Commonwealth, before the passing of the revised statutes. The case in 2 Greenl. 191 was decided on the common law of Massachusetts.

The Rev. Sts. *c.* 92, §§ 12, 13, in terms, cover this case, and were intended to make certain a matter, on which there had been an apparent conflict of decisions; as in 13 Mass. *ubi sup.* and *Sheehy* v. *Mandeville*, 6 Cranch, 253. Judgments in another State stand on the same ground, in most respects, as judgments in this State. It was a judgment in New Hampshire that was held to be no bar in *Dennett* v. *Chick*, before cited.

A plea *puis darrein continuance* is a waiver of former pleadings. 1 Chit. Pl. (6th Amer. ed.) 697, 698. Steph. Pl. (1st Amer. ed.) 83. *Webb* v. *Steele*, 13 N. Hamp. 230. This doctrine is as applicable to notices or specifications, under *St.* 1836, *c.* 273, § 2, as to special pleas at common law. See *Brickett* v. *Davis*, 21 Pick. 404. *Littlefield* v. *Pratt*, 8 Met. 287.

Shaw, C. J. 1. The first question is, whether a judgment against one of two joint obligors is a bar to an action of debt, on the original obligation, against another joint obligor. It seems to be useless to examine and review the numerous authorities cited in the argument; because we think the case is within the provisions of the revised statutes, intended, apparently, to remove doubts, fix the law upon the subject, and do away

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the effect of those authorities, so far as it is in conflict with them. By Rev. Sts. c. 92, § 12, it is provided, that in a suit against several, on a joint contract, if one only is legally served, the suit may proceed to judgment against such one, without further proceedings against the others; and by § 13, if such judgment remain unsatisfied, an action on the same contract may be afterwards maintained against any of the other joint contractors, as if the contract had been joint and several. This is equivalent to an express enactment, that such prior judgment against one shall not be a bar to an original action against another joint obligor. It is a statute severance, and analogous to the case, where one joint obligor dies, in which a separate suit may be maintained against the survivor. If, therefore, the judgment relied on had been a judgment in Massachusetts, the statute would have been an answer to the objection. And the court are of opinion that a judgment in New Hampshire, which by courtesy is allowed to have, in most respects, the force and effect of a domestic judgment, can have no greater effect in barring an action in this Commonwealth. The court are of opinion that, upon this point, the decision of the court of common pleas was right.

2. Another question arises in this case, which was this: The defendant having pleaded the general issue, and filed a specification of defence, conformably to the present practice established by *St.* 1836, *c.* 273, the action was continued. At a succeeding term, the defendant, by leave, filed another specification of defence, consisting of matter which occurred since the last continuance; to wit, the recovery of a judgment, as hereinbefore stated, in another State, against another party. on the same obligation, and relied upon such judgment as a bar. He also offered evidence, under his original specification of defence, of matters in bar. This was objected to. The court decided that such second specification of defence, and a reliance upon it, at the time, by giving evidence under it, was in the nature of a plea *puis darrein continuance*, was a waiver of his former plea, and that the defendant could

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not give evidence, under it, in support of his original matter in bar.

The court are of opinion that this was pressing the analogy of our present practice to special pleading, beyond its just bearing. It would, no doubt, be held, under the practice of special pleading, that a plea in bar, *puis darrein continuance*, is a waiver of all prior pleas of matter of fact. It is founded on the well established rule, that regularly, at common law, a party can have but one plea in bar; and if that is found against him, judgment is in chief. If it were otherwise, and he might have judgment to plead over, pleas would extend *ad infinitum*. Gould Pl. 373. This being the case, a plea since the last continuance, being a special plea, is of necessity a waiver of his prior plea, whether it be the general issue or a plea in bar. Bac. Ab. Pleas and Pleadings, Q.

Whether a plea *puis darrein continuance* can be pleaded after a demurrer, and whether, if it can, it waives the demurrer, may be considered doubtful. In *Martin* v. *Wyvill*, 1 Stra. 493, it was said *arguendo*, by Eyre, J. citing Mo. 871, that this plea could not be pleaded after a demurrer; on which the other judges expressed no opinion. But this was opposed to the case of *Stoner* v. *Gibson*, Hob. 81. And see also *Barber* v. *Palmer*, 1 Ld. Raym. 693, and 1 Salk. 178. But without going more minutely into the rules of special pleading, the court are of opinion that the legislature intended, by *St.* 1836, *c.* 273, § 1, to give the benefit of any matter of valid defence under the general issue. The provision is that "in every civil action hereafter to be tried, in the supreme judicial court or court of common pleas, all matters of law or of fact, in defence of such action, may be given in evidence under the general issue." By § 2, courts are authorized to pass rules respecting notices to the opposing party; but this does not vary the effect of the general issue. The statute manifestly extends to all matters which may exist at the time of the trial, and may then be effectual in law to bar the action. Many such matters, as payment, release, accord and satisfaction, and the like, may first arise and commence

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after the action is brought, after it is entered, after plea pleaded and issue joined, and yet be a complete defence. The statute fully embraces and includes all matters in defence. The court are therefore of opinion that the defendant should have been admitted to show, if he could, the matters of defence, of which notice was given by his first specification. This having been refused, the exceptions, for this reason, must be sustained.

Verdict set aside, and a new trial ordered.

THEODORE H. SWEETSER *vs.* JOTHAM S. FRENCH & others.

M. & D. made a note to F. & Co., not negotiable, and F. & Co., at the same time, wrote their names in blank on the back of the note, and M. & D. transferred it to A. *Held*, that A. had legal authority to write over the names of F. & Co. a promise to pay the contents of the note to him, and that he might recover of them the amount of the note, in an action of indebitatus assumpsit on the money counts.

A note in this form, viz. "$300. For value received, I promise to pay F. & Co. three hundred," is a good note for three hundred dollars.

THIS was an action of assumpsit, originally brought by Theodore Ames and Peter H. Coburn, partners, and afterwards prosecuted by the plaintiff, who was appointed assignee of their estate, under the insolvent laws, on a note of hand of the following tenor: "$300. For value received, we promise to pay French, Tapley & Co. three hundred, payable in fifteen days from date and grace. Rufus McLellan,

Lowell, May 9th 1845. J. De Puy."

On the back of the note the names of "French, Tapley & Co." were indorsed in blank.

The counts in the declaration, on which the plaintiff relied, were in indebitatus assumpsit, for money had and received, money paid, &c.

Trial before *Shaw*, C. J. at the last April term.

Before the commencement of the trial, the plaintiff, at the bar, wrote over the names of the defendants, on the back of the note, these words: "For value received, we promise to

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pay the money, mentioned in the within note, to T. Ames & Co., according to the tenor thereof."

There was evidence that the firm of French, Tapley & Co. consisted of Jotham French, David Tapley and Charles L. Bailey; that the name of French, Tapley & Co., on the back of said note, was in the hand writing of David Tapley, one of the defendants, and that French, another of the defendants, was called upon, by Charles H. Moore, a clerk of T. Ames & Co., on the day the note became due, in the forenoon, for the money on the note, and that French replied, that he was not then prepared to pay it, but if they would send it in the afternoon, he would pay it, or try to pay it.

The plaintiff then offered to prove that said Rufus McLellan, in business with J. De Puy, on the day of the date of the note, went to T. Ames & Co., to get them to raise for him the sum of $300, and told them that if they would get him the money, he would give them a note signed by the defendants; that he went to the defendants, and got them to sign their name to this note, and gave them security for so doing; that he then carried the note to T. Ames & Co., and they raised for him the sum of $300. The plaintiff also offered to prove that said French confessed, at three different times, that the firm of French, Tapley & Co. were indebted to said Ames & Co. on said note, and promised to pay it. But the judge ruled that such evidence, so far as it was competent, would be insufficient to prove an authority from the defendants to the plaintiff to fill up the indorsement in the manner stated, and support the action. He also expressed a doubt whether the action could be maintained, as no sum of money was expressed in the body of the note. The plaintiff thereupon submitted to a nonsuit, subject to the opinion of the whole court upon the facts in the case.

Wentworth, for the plaintiff. Ames & Co. were authorized to fill up the blank with the words which they wrote. *Josselyn* v. *Ames*, 3 Mass. 274. *Union Bank of Weymouth & Braintree* v. *Willis*, 8 Met. 504, and cases there cited.

The omission of the word "dollars" in the body of the

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note is immaterial. The note is for value received, and the dollar mark and the figures "300" are in the margin. This is sufficient to make the instrument a good promissory note for that sum. *M'Coy* v. *Gilmore*, 7 Ham. Part 1st, 268. See also *Boyd* v. *Brotherson*, 10 Wend. 93. *Booth* v. *Wallace*, 2 Root, 247. *Norwich Bank* v. *Hyde*, 13 Connect. 279. *Elliot's case*, 2 East P. C. 951, and 1 Leach, (3d ed.) 210.

J. G. Abbott, for the defendants. The case of *Josselyn* v. *Ames*, cited for the plaintiff, is very imperfectly reported. It would seem, from the report, that all the parties were *connected originally* in an agreement to become sureties for Oliver Ames. There is no other case like that; none in which the payee of a note not negotiable has been charged in the manner attempted in this case. The defendants should have been treated as indorsers, and not as promisors or guarantors. See Story on Notes, § 128. Story on Bills, §§ 199, 202. Chit. on Bills, (8th Amer. ed.) 219. Bayley on Bills, (5th ed.) 120, 121. *Jones* v. *Fales*, 4 Mass. 245. *Sanger* v. *Stimpson*, 8 Mass. 260. *Hill* v. *Lewis*, 1 Salk. 132. *Aldis* v. *Johnson*, 1 Verm. 136.

The plaintiff cannot recover the amount of the note, on the money counts, as the evidence does not show a legal demand and notice.

The omission of the word "dollars" probably furnishes no ground of defence.

Wentworth, in reply. French's acknowledgment, after the maturity of the note, that the firm owed it, and his promise to pay it, were a waiver of demand and notice, even if the defendants are to be treated as indorsers. 8 Pick. 1.

Dewey, J. The weight of authority, resulting from the adjudicated cases, is clearly with the plaintiff, as to the right to fill up the blank indorsement of the defendants, in the manner proposed by him. The case of *Josselyn* v. *Ames*, 3 Mass. 274, is direct to the point, and well authorizes it. This class of cases has recently been under the consideration of the court in the case of *Union Bank of Weymouth & Braintree* v. *Willis*, 8 Met. 504; and after a full review of

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the various cases, and with a knowledge that doubts have been sometimes suggested as to their correctness, we did not feel authorized to overrule them, nor disposed to deny them their full effect as authoritative decisions.

The objection arising from the omission of the word "dollars," in the body of the note, is not insisted on by the defendants' counsel. The figures and characters in the margin seem sufficiently to supply this obvious omission. The cases cited are conclusive on this point. See also *Phipps* v. *Tanner*, 5 Car. & P. 488.

The common money counts are sufficient to embrace the present cause of action. If a specification of the plaintiff's claim, or a bill of particulars, be required, the plaintiff may have leave to file the same.

Nonsuit taken off, and a new trial ordered.

JOHN O. BENTHALL *vs.* JOSEPH J. JUDKINS & others.

In an action by the payee of a negotiable note against two or more persons, as joint promisors, where one of the defendants' names is on the face of the note, and the names of the others are on its back, without date and in blank, the legal presumption is, that all the names were signed at the same time.

ASSUMPSIT on the following note: "Lowell, April 29th 1846. For value received, I promise to pay J. O. Benthall, or order, two hundred and fifty dollars, ten days from date. J. J. Judkins." On the back of this note, in blank, were the names of the other two defendants, Samuel J. Varney and Artemas L. Brooks.

At the trial in the court of common pleas, before *Wells*. C. J. the plaintiff produced the note, but offered no evidence as to the time when, or under what circumstances, the names of Varnev and Brooks were placed on the back of it; nor did he offer any evidence that either of them ever had notice that the note was not paid at maturity. Several payments were

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indorsed on the note, but it did not appear by whom they were made.

The defendant contended that the three defendants could not be joined in one action on the note, and that the action could not be sustained upon the facts in evidence. But the judge ruled otherwise, and also ruled that the presumption was, that the names of all the defendants were put upon the note before it was delivered to the plaintiff. As there was no evidence to rebut this presumption, the judge instructed the jury that they should return a verdict for the plaintiff, for the amount remaining due on the note. A verdict was returned accordingly, and the defendants alleged exceptions.

J. G. Abbott, for the defendants. In a suit against parties, as original promisors, who put their names, in blank, on the back of a note, the plaintiff must prove affirmatively that their names were put there at the time when the note was made by the promisor who signs on the face of the note. In *Union Bank of Weymouth & Braintree* v. *Willis*, 8 Met. 504, all the prior cases are discussed, and it appears that, in all of them, the fact was, that such names were originally on the note. In *Richardson* v. *Lincoln*, 5 Met. 203, the court said that when a party, who is not the payee of a note, puts his name upon it in blank, "he must be considered an original promisor and surety, if he so put his name upon it simultaneously with the promisor, as an original contractor;" thereby affirming, by the strongest implication, that it is a fact to be proved affirmatively. And in that case the plaintiff gave affirmative evidence of this fact. The note itself does not show whether the signers on the back meant to contract as joint original promisors, or as guarantors. If they sign as guarantors, a new consideration must be shown. *Tenney* v. *Prince*, 4 Pick. 385. *Samson* v. *Thornton*, 3 Met. 279.

Caverly, for the plaintiff. Varney and Brooks are to be considered as original promisors. *Sumner* v. *Gay*, 4 Pick 311. *Austin* v. *Boyd*, 24 Pick. 64. *Richardson* v. *Lincoln*, 5 Met. 201. In this last case, the plaintiff gave evidence of a fact which would have been presumed without evidence

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In the case cited from 8 Met. 504, Hubbard, J. said that the presumption was, when such a note is in the hands of a *bona fide* holder, that the signatures on the face and on the back were simultaneous.

Abbott, in reply. The case, in which Hubbard, J. made the remark cited, was an action by an indorsee against an indorser. The same presumption is not to be made in favor of the original holder, who knows all the facts.

Dewey, J. This case falls within the well settled principle of law, repeatedly decided in this court, charging a party, under circumstances like the present, as an original promisor. To make him such, it is necessary that the signature of the party sought to be charged should be placed on the note at the time of its execution; or, in other words, that the promise be made at the time when the note itself is made. But upon the production of the note, by a *bona fide* holder, accompanied by the signature of the defendant on the back thereof, in blank, and without date, and nothing appearing to the contrary, the presumption is, that it was thus signed by the defendant at the time of the making of the note. *Union Bank of Weymouth & Braintree* v. *Willis*, 8 Met. 504. No further proof, therefore, was necessary to be introduced by the plaintiff, to maintain his action.

Exceptions overruled.

Horatio J. Fowler *vs.* Tristram C. Gilman.

When the plaintiff, in an action of trover, admits that the defendant, at the time of the conversion, had a lien on the goods for an ascertained amount, the rule of damages is the value of the goods, deducting the amount of the lien, and adding interest on the balance.

Trover for a wagon. At the trial in the court of common pleas, before *Washburn*, J. there was evidence tending to show that one Orfut, under whom the defendant claimed title to the wagon, bargained the same to Henry Fowler, under whom

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the plaintiff claimed it, the bargain being that the wagon should be said Henry's upon his paying a certain price; that Orfut sold his interest in the wagon to the defendant, who had knowledge of the aforesaid bargain, and that said Henry sold his interest in the wagon to the plaintiff; that said Henry made several payments towards the agreed price; and that when Orfut sold his interest to the defendant, a balance of $14 was due towards the contract price for the wagon.

It was also in evidence that, while the wagon was in the defendant's possession, the plaintiff tendered to him the aforesaid sum of $14, and demanded the wagon of him, and that he refused to accept the sum tendered, denying the plaintiff's title. No money was paid into court, and there was no evidence that the defendant demanded the $14 of the plaintiff, after the tender. The plaintiff's counsel asked the judge to instruct the jury that, in fixing the amount of damages, if they should find for the plaintiff, they should not deduct the $14 from the estimated value of the wagon. The judge so instructed the jury, who found a verdict for the plaintiff for the full value of the wagon. The defendant alleged exceptions to the judge's instructions.

J. G. Abbott, for the defendant.

Wentworth, for the plaintiff.

Shaw, C. J. It appears to us that the jury should have been instructed to deduct the fourteen dollars from the value of the wagon, in case of a verdict for the plaintiff. No doubt the true general rule of damages, in trover, is the value of the goods at the time of conversion, with interest. *Kennedy* v. *Whitwell*, 4 Pick. 466. This rule applies where the plaintiff is the general owner, or is answerable over to others. But where the plaintiff admits that the defendant has a lien on the property, to a certain amount, that amount may be deducted by the jury, in assessing damages. *Green* v. *Farmer*, 4 Bur. 2214, 2223. *Chamberlin* v. *Shaw*, 18 Pick. 283. *Dresser Manuf. Co.* v. *Waterston*, 3 Met. 9.

It is to be taken, in this case, and the plaintiff, by his tender, has admitted, that the defendant had the same lien on the

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wagon which Orfut had when he sold his interest therein to the defendant, namely, a lien for the unpaid balance of the price which Henry Fowler had agreed to pay for the wagon, before it should become his property. The amount of that lien is agreed to have been fourteen dollars.

By consent of parties, the verdict may be amended by deducting fourteen dollars therefrom, and judgment be rendered on the verdict so amended. Otherwise, the verdict will be set aside, and a new trial had in the court of common pleas.

Abi Lewis *vs.* Thomas Sumner.

When a sworn attorney of the court enters his appearance for a party, the party is bound by any admissions made by him, in writing, though out of court, concerning the facts in the cause, until the appearance is withdrawn, or the party revokes the attorney's authority, and gives notice of the revocation: Until the appearance is withdrawn, or the authority revoked and the revocation notified, the party cannot give evidence, on the trial of the cause, that the attorney had no authority in fact.

This was an action of trespass upon the case against a deputy sheriff for taking and selling a barn, as personal property, on the 21st of June 1844. The defendant pleaded the general issue, and filed a specification of defence, justifying the seizure and sale of the barn by virtue of an execution in favor of Rice & Simonds of Boston, against Richard P. Corey of Charlestown.

At the trial in the court of common pleas, before *Cushing*, J. the plaintiff, in support of her action, gave in evidence a mortgage deed, duly executed by said Corey, and recorded in the office of the clerk of Charlestown on the 5th of August 1843, by which said Corey conveyed the barn in question, and other articles, to the plaintiff, to secure payment of a note for $200, bearing even date with said mortgage, and payable to the plaintiff, or her order, in one year from its date, with interest; which note the plaintiff produced and put in evidence. The mortgage contained a provision, that the

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mortgagor should remain in the undisturbed use and possession of the mortgaged property until breach of the condition of the mortgage.

The plaintiff, to show that she had made a statement of her claim, and a demand on the defendant, as required by the Rev. Sts. c. 90, § 79, offered in evidence a paper, of which the following is a copy: "Middlesex ss. C. C. Pleas, 1845. Abi Lewis *vs.* Thomas Sumner. It is hereby agreed that due notice was given by the plaintiff, in writing, to the defendant, of her just claim by mortgage on the property declared on, in due time before the commencement of this action; and demand of payment was then made. C. G. Thomas, attorney for defendant."

The name of Mr. Thomas, and also the names of "Buttrick & Marrett," appeared on the clerk's docket, as attorneys for the defendant. The plaintiff's counsel stated that he wrote the paper, during the term of the court at which the trial was had, and a few days before the trial, and that it was signed by Mr. Thomas, for the purpose of relieving him from the necessity of attending as a witness on the trial. The defendant objected to the admission of said paper in evidence, and offered to show that Mr. Thomas had not in fact been counsel for the defendant, in this action, for a year before the trial. The judge refused to admit the evidence thus offered by the defendant, and overruled the objection to the admission of the paper signed by Mr. Thomas.

The plaintiff then gave evidence as to the value of the barn, at the time of the sale thereof by the defendant, and there closed his case.

The defendant then introduced evidence tending to show that the aforesaid note and mortgage were without consideration, and were made to delay or defraud the creditors of said Corey. The whole evidence was submitted to the jury, who found a verdict for the plaintiff. The defendant alleged exceptions to the judge's rulings.

Buttrick, for the defendant. If it be said that Mr. Thomas's name was on the record, as attorney, and that the record cannot

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be contradicted, the answer is, that this rule of evidence does not estop a party from showing that the attorney of record had no authority. *Hall* v. *Williams*, 6 Pick. 232 *Brewer* v. *Holmes*, 1 Met. 288. *Handley* v. *Statelor*, Litt Sel. Cas. 186. *Cox* v. *Hill*, 3 Ham. 411. *Crichfield* v *Porter*, 3 Ham. 518.

An attorney cannot bind his client, in a case pending in court, by unauthorized acts out of court.

Willey, for the plaintiff.

Shaw, C. J. The main question in this case arises upon the objection taken by the defendant, to a paper, purporting to be signed by his attorney in court. In the course of the trial, it became necessary for the plaintiff to prove that she gave notice in writing to the defendant, the attaching officer, of her mortgage on the property, in due season, and made demand of payment thereof. To prove this, she produced the admission, in writing, of C. G. Thomas, attorney of the defendant, purporting to be made in the cause in court. It is conceded that Mr. Thomas is a sworn attorney, admitted to practise in the courts of the Commonwealth; that his appearance had been entered, as attorney for the defendant, some term previous, and had not been withdrawn.

The defendant objected to the admission of said paper as evidence, and offered to show that Mr. Thomas had not in fact been counsel for the defendant, in this action, for a year before the trial. The court refused to admit the evidence thus offered by the defendant, overruled the objection, and admitted the said paper.

The court are of opinion that the paper was very properly admitted. Nothing is more important, in a litigation in court, than for a party to know who is his adversary's accredited agent, and with whom he may safely deal in that capacity. Hence the great need, in all courts, of setting apart officers, recognized as attorneys, and determining their qualifications, rights and powers. When, therefore, an appearance is entered for a party, by a regular attorney, all parties have a right, *prima facie*, to regard him as the accredited representative of

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such party. It would be a great misdemeanor in an attorney, rendering him liable to censure and punishment, as well as to an action for damages, in a proper case, if he were to enter an appearance without an authority. *Smith* v. *Bowditch*, 7 Pick. 137. *Field* v. *Gibbs*, Peters C. C. 158. It follows from this, that when once an attorney has been recognized as the representative of a party on the record, he shall be presumed so to continue, until his authority is revoked, and his appearance withdrawn, and due notice thereof given; and the court of common pleas and this court have rules, prohibiting the change of attorneys, without notice. 24 Pick. 384.

The importance of upholding agreements and concessions like the present, between attorneys and counsel of litigating parties, is greater than it might seem at first blush, and is enhanced by our present practice. In most cases of controverted facts, many facts are embraced in the issue, which are not really in dispute between the parties; but each must be prepared to prove all the facts necessary to his own case, unless he can previously obtain a concession from the adverse party, in a form which he can rely upon, at the trial. It is, therefore, a wise, useful and beneficial practice, resorted to by those who are most careful in preparing causes for trial, and a practice well deserving to be encouraged by the courts, for the parties, by their attorneys, to obtain and give mutual concessions, in writing, of all the material facts, not intended to be controverted, and so narrow the litigation to the precise matters in controversy. It saves expense, avoids surprise and delay, and often prevents the loss of a good cause, by an unexpected call for proof, which could easily have been obtained, if it had been anticipated that such fact would be called in question. This practice of admitting facts is the more necessary, since the disuse of special pleading, which was designed, and to some extent had the effect, to narrow the issue on record to some one or a few questions of fact. This consideration renders it important to hold, that a litigant party shall not be permitted to deny the authority of his attorney of record, whilst he stands as such on the docket. He may revoke his

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attorney's authority, and give notice of it to the court and to the adverse party; but whilst he so stands, the party must be bound by the acts of the attorney.

It was stated in the argument for the defendant, that though an attorney may bind his client, it is only by acts done in court. We cannot admit the correctness of this view. Many things may and ought to be done out of court, and in vacation, with a view to the proper conduct of the cause. All acts to be done by an attorney, without special directions, must be acts within the scope of his official authority and duty, in the proper conduct and management of the cause in which he is engaged; and this is the proper limit of his authority. *Exceptions overruled.*

ARCHIBALD BABCOCK *vs.* GODFREY B. ALBEE.

A landlord gave a tenant of a store three months' notice to quit, and at the end of three months, upon the tenant's saying that it would be a great accommodation to him to remain in the store a while longer, so that he might sell off his old goods, without removing them, the landlord told him he might remain in the store a while longer: After the tenant had remained in the store sixteen days, the landlord brought an action against him, on the Rev. Sts. *c.* 104, to obtain possession. *Held*, that if the parties agreed that the tenant should occupy the store for a short though indefinite period, after the time limited in the notice, with a view to the convenience of the tenant, such agreement was not a waiver of the notice and a renewal of the tenancy, and that the landlord might maintain the action, without giving the tenant any further notice to quit.

THIS was an action, commenced April 16th 1845, upon the Rev. Sts. *c.* 104, to obtain possession of a store in Charlestown.

At the trial in the court of common pleas, before *Cushing*, J. on appeal from a justice of the peace, the plaintiff gave evidence that the defendant had occupied the store for about three years, and that, on the 31st of December 1844, the plaintiff, for the purpose of determining the tenancy, gave a written notice to the defendant to vacate the store in three months.

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The defendant then gave evidence, that the plaintiff called upon him, on the 31st of March 1845, and asked him if he was ready to move out; that the defendant said he did not know as he was; that the plaintiff asked him if it would be any accommodation to him to remain a while longer; that the defendant told him it would be a very great accommodation, as he should like to sell off his old goods, and not move them to another store; and that the plaintiff then said the defendant might remain in the store a while longer.

The judge instructed the jury, that if, after notice had been given to the defendant to quit, the parties agreed simply for a further occupation of the store, without limiting the time of such occupation, this agreement would amount to a waiver of the notice and a renewal of the tenancy. But if the parties agreed that the defendant should occupy for a short though indefinite period, after the expiration of the time limited in the notice, with a view to the convenience of the defendant merely, such agreement would not amount to a waiver of the notice and a renewal of the tenancy.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions to the judge's instructions.

Willey, for the defendant.

J. Dana, for the plaintiff.

Shaw, C. J. The court are of opinion that the instructions to the jury were right. The effect of the permission of the plaintiff to the defendant, to remain a while longer, till he could sell off his goods, made the defendant either a tenant at sufferance, or it was a demise for a term, understood by the parties to be fixed by the purpose to be accomplished; in either of which cases, the defendant was not entitled to any new notice. ***Exceptions overruled.***

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Jeremiah Tuttle *vs.* Samuel Bean.

A landlord, to whom rent was payable monthly, gave notice to the tenant, on the 1st of November, to quit "for the non-payment of rent:" On the same day, the tenant tendered to the landlord the amount of several months' rent; but it did not appear whether the tender was before or after the service of the notice: When the tender was made, the landlord said he did not wish to take the money, as repairs had been made by the tenant, and he did not know what balance was due; and he told the tenant that he need not quit the premises, and that when he (the landlord) should come again, he would see what the balance was, and would settle: After the tenant had continued in possession six or seven weeks, the landlord brought an action against him on the Rev. Sts. *c.* 104. *Held*, that the landlord, under the notice given by him, could recover only on the ground of non-payment of rent; that if the tender was before notice given, and the landlord declined to receive the money, for the reason given by him, then the rent was not in arrear, within the meaning of the law, and the landlord could not recover on that ground; that if the tender was after notice given, and the landlord declined to receive the money, and told the tenant that he need not quit, this was a waiver of the notice and a renewal of the tenancy, and the landlord could not recover on that notice.

This was an action on the Rev. Sts. *c.* 104, commenced in the police court of Lowell, on the 19th of December 1844, to recover possession of a tenement in Lowell. On appeal from said court, the case was tried in the court of common pleas, before *Cushing*, J. The plaintiff gave evidence that he caused a written notice, signed by him, to be served upon the defendant, on the 1st of November 1844, to quit said house, "for non-payment of rent." He also gave evidence that the rent was, by a contract of his agent with the defendant, to be two dollars per month, payable monthly; and evidence tending to prove that the rent was in arrear, when the notice to quit was given.

The defendant gave in evidence the following receipt: "Lowell, April 10th 1844. Received of Samuel Bean two dollars for one month's rent to March 23d 1844. Timothy Frye for Jeremiah Tuttle." It also appeared that said Frye had been an agent of said Tuttle, the plaintiff. It also appeared that a notice to quit had been served on the defendant prior to the notice above mentioned, viz. on the 19th of October 1844, purporting to be signed by the plaintiff.

The defendant also introduced a witness who testified that

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on the 1st of November 1844, he saw the defendant offer the plaintiff seventeen dollars in payment of the balance of the rent; that the plaintiff said the defendant had made repairs on the premises, and that he (the plaintiff) could not tell what the balance was, and did not care about taking the money; but that the defendant need not quit the premises; and that he had no objection to the defendant's remaining in possession of the premises, and that when the plaintiff came to Lowell again, he would see what the repairs were, and would settle. It did not appear whether this conversation was before or after the service of the plaintiff's notice, of November 1st 1844, on the defendant to quit.

Upon this evidence, the judge charged the jury, that it did not appear that a legal tender had been made, by the defendant to the plaintiff, of the balance of rent, so as to bar the plaintiff's suit; it not appearing that said tender was made when the rent became due. The jury thereupon found a verdict for the plaintiff. The defendant alleged exceptions.

Caverly, for the defendant. The charge to the jury was contrary to the provision of Rev. Sts. *c.* 100, § 14, that "the payment or tender of payment of the whole sum due on any contract for the payment of money, although made after the money has become due and payable, may be pleaded to an action subsequently brought, in like manner, and with the like effect, as if such payment or tender had been made at the time prescribed by the contract." But if the law had required the tender to be made when the rent became due, the plaintiff waived all exceptions to its not being made earlier, not only by his not objecting to the tender, but also by his reply to the defendant on the first of November 1844. The only excuse, made by the plaintiff, for not receiving the rent, was, that part of the rent had been paid by repairs, and he had not ascertained the amount that was due to him. At the same time, he told the plaintiff that he need not quit the premises. By this all prior notices to quit were waived.

But it is a sufficient ground to sustain the exceptions, that upon the question of tender, the charge was erroneous. So

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far as the case finds, this was the only question on which the jury were charged.

Beard & Gunnison, for the plaintiff. As a full month's notice to quit was given before this action was commenced, the plaintiff could maintain the action. Such notice would have terminated the tenancy, even if no rent had been due. Rev. Sts. c. 60, § 26.

A tender of rent must always be made at the time it becomes due, if any advantage is to be taken of such tender. *Carley* v. *Vance*, 17 Mass. 389. *Dewey* v. *Humphrey*, 5 Pick. 187.

If the defendant made a tender, on the 1st of November 1844, as alleged, he confessed, by the amount which he tendered, that he had then forfeited his tenancy.

Shaw, C. J. It was argued for the plaintiff, that, by Rev. Sts. c. 60, § 26, he might recover in this process, on a month's notice to quit, where the defendant held as tenant at will, paying rent, by agreement, at intervals of one month, whether the rent was in arrear or not. Perhaps he might, had his notice to quit been general; but the case finds that it was a specific notice to quit "for the non-payment of rent." Upon that ground only can he recover, under this notice.

The question was upon the sufficiency of the tender, and waiver of the notice. The notice to quit and the tender being made on the same day, but it not being stated at what hour of the day they respectively took place, it was left doubtful whether the tender was made before or after the notice. If the tender was made before notice given, and the complainant declined receiving it for the reason stated, then the rent was not in arrear, within the meaning of the statute, the notice was not sustained by the fact, and the plaintiff could not proceed on that ground.

If this interview took place after the notice was given, on the same day, and the plaintiff declined taking the money when offered, and told the defendant he need not quit, it was a waiver of the notice, a renewal of the tenancy at will, and the plaintiff could not sustain his complaint on that notice.

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As the main object of the statute apparently is, to secure and enforce the payment of rent, there is, perhaps, good ground to hold, that if the full amount of rent is tendered at any time before proceedings are commenced, under the landlord and tenant act, it is a good bar to such complaint. Rev. Sts. c. 100, § 14. But the court have not thought it necessary to proceed on that ground, in the present case; being of opinion that the charge was incorrect, in not submitting to the jury the evidence showing that the plaintiff declined to receive the money, not because it was not tendered when it became due, but on other distinct grounds, if made before the tender; or to prove a waiver of the notice, if made after.

Verdict set aside, and a new trial to be had in this court.

HARRIET D. SNELL *vs.* BENJAMIN SNOW, JR.

A declaration, in an action for slander, alleged that the defendant falsely and maliciously said of the plaintiff, "she is a bad girl, a very bad girl, and unworthy to be employed by any company in Lowell; meaning thereby, that the plaintiff was a prostitute, and had been guilty of fornication, lewdness, lasciviousness and wantonness." *Held*, that the declaration was insufficient, for want of averments and a colloquium that would warrant the innuendo.

On the trial of an action for slander, a witness, who testifies to the words spoken by the defendant, cannot be permitted to state what meaning he understood the defendant to convey by the words.

SLANDER. The first count in the plaintiff's declaration alleged that the defendant, on the 28th day of November 1844, at Lowell, "in the presence and hearing of divers good people of this Commonwealth, did loudly and publicly speak, utter and publish the following false, malicious and scandalous words, of and concerning the plaintiff, to wit, 'she (meaning the plaintiff) is a bad girl;' then and thereby meaning and intending that the plaintiff was a prostitute, and had committed the atrocious crime of fornication." The second, fourth and fifth counts alleged that the defendant, on different days, said of the plaintiff, "she is a very bad girl," meaning

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thereby that she was a lewd, lascivious and wanton person, and had committed and was guilty of the crimes of fornication, prostitution, lewdness, &c. &c. The third count alleged that the defendant, on the 29th of November 1844, said of the plaintiff, "she is a bad girl, and unworthy to be employed by any company in Lowell," meaning, as is alleged in the other counts. The sixth count alleged that the defendant, at Lowell, on the 2d of December 1844, "did loudly and publicly, openly and falsely, charge the plaintiff with being guilty of the crimes of fornication, lewdness, lasciviousness and wantonness."

The defendant pleaded the general issue, and the case was tried in the court of common pleas, before *Washburn*, J. at September term 1846.

When the counts were read to the jury, the defendant objected that they were insufficient; the words alleged to be spoken not being actionable, without a further colloquium than is contained in said counts. The judge sustained the objection as to all the counts but the sixth, and the trial, by his direction, proceeded on the sixth count alone.

Jotham S. French was called as a witness by the plaintiff, and testified as follows: "I went to the counting room of the Middlesex Company, to see if there was not some way in which matters could be fixed, so that the plaintiff could be employed. The defendant said he did not know, or did not see, any way it could be fixed; she was a bad girl, a very bad girl. I then turned to Mr. Lawrence, and told him I wished there could be some way fixed, so that she could go to work. I told the defendant, in the first part of the time I was there, that the plaintiff had worked for me, and her reputation stood high then. The defendant said she must have altered very much since, for she was now a very bad girl. I told Mr. Lawrence I was aware of their rules, but I supposed them to apply only to those wilfully vicious. He replied that such was the case. The defendant was then present. I turned to him, and inquired what she had done to render her unfit. He replied that she was a bad girl, and ought not to be allowed

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around among other girls; and I think there was included in the statement, 'she was unfit to be employed.' I cannot say whether this expression was before or after he used the words 'ought not to be around among other girls.'"

The plaintiff then inquired of the witness, what meaning he understood the defendant to convey by these words. To this inquiry the defendant objected, and the judge ruled, that the witness might testify as to any existing facts or circumstances, to which the defendant referred, if any; but that, as the witness had proposed to give the whole conversation, it was for the jury to determine what was meant by the language, and that it was not competent for the witness to testify as to his understanding of the meaning of the defendant in the words made use of; and that the above inquiry was not in this case competent.

There was testimony, on the part of the defendant, as to what was said at the interview at the counting room, some of which was contradictory to that of the above witness.

The jury returned a verdict for the defendant. The plaintiff alleged exceptions to the judge's ruling as to the sufficiency of the first five counts, and as to the competency of the inquiry last put to the witness.

J. G. Abbott, for the plaintiff. The question, how the witness understood the defendant's words, was a proper one. It is stated in various authorities, that "the understanding of the hearers is the rule to go by," and that "the words shall be taken in the sense in which the hearers understood them." *Fleetwood* v. *Curley*, Hob. 267. *Harrison* v. *Thornborough*, Gilb. Cas. 114, 117. *Oldham* v. *Peake*, 2 W. Bl. 959, and Cowp. 275. *Read* v. *Ambridge*, 6 Car. & P. 308. *Roberts* v. *Camden*, 9 East, 96. *Studdard* v. *Linville*, 3 Hawks, 474. 1 Vin. Ab. Actions for Words, A. b. 2 Greenl. on Ev. § 417. 2 Selw. N. P. (11th ed.) 1257.

Hopkinson & B. F. Butler, for the defendant. The five special counts (which the plaintiff's counsel seems to have given up) contain no colloquium that warrants the innuendoes which enlarge the meaning of the words. *Bloss* v. *Tobey*,

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2 Pick. 320, 328. *Carter* v. *Andrews*, 16 Pick. 1. *Barham* v. *Nethersall*, Yelv. 22. *Rex* v. *Alderton*, Sayer, 280.

The question put to the witness was clearly incompetent. The jury are to decide on the meaning of the words, from the words themselves, and the concurring facts proved.

Shaw, C. J. From that portion of the evidence stated in the bill of exceptions only, it seems difficult to avoid the belief that the words relied on, to maintain this action of slander, constituted a privileged communication, and so were not actionable. But as the case was not placed on that ground, and as it may be presumed that the whole case does not appear in the bill of exceptions, we shall consider only the points taken, without regard to any other supposed views, which might have been suggested.

1. The first objection taken by the plaintiff is, that the court sustained the defendant's exception to the first five counts, as insufficient, because the words set forth, without suitable averments and *colloquia* to explain and enlarge their meaning, if the case would warrant it, were not actionable.

This would at first appear to be a demurrer *ore tenus* to these counts, to be decided by the court, which was sustained, and which would be irregular. But taken all together, we think that it was an expression of opinion, on the part of the court, that these counts would be deemed bad on a motion in arrest of judgment, should a verdict be rendered on them, and therefore it would be useless to go into evidence to obtain a verdict, which could not be the foundation of a judgment; and that in this decision the party acquiesced, and proceeded upon the sixth count. This count was general, alleging that the defendant openly and publicly charged the plaintiff with being guilty of the offence of fornication, lewdness, &c. and in effect, therefore, charged, in another form, the same slanders set forth more particularly in the preceding counts. By this course, in confining the evidence to the last count, the plaintiff could sustain no inconvenience, if the judge was right in his opinion that those counts were bad and insufficient. On the contrary, she would obtain a benefit from it, by being

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saved the expense of a useless trial, and by avoiding the hazard of losing the benefit of a verdict, if she should get one, on a good count, because such count was connected with those which would be held bad on a motion in arrest of judgment.

This court entirely concurs in the opinion of the court of common pleas, that the first five counts are bad. The words set forth in all of them were, "she is a bad girl," or "a very bad girl." There was no averment of other conversation which took place at the same times, nor any averments of other exterior facts, which, if true, would give a peculiar force and effect to the words used, or show that, though in their natural meaning they did not impute unchaste conduct to the plaintiff, yet, in the connexion in which they were used and applied to the plaintiff, they would have that effect. It is true that these words are greatly enlarged and expanded by the innuendoes; but these cannot aid the declaration, and make it good. The reasons for this are so fully stated, and the point is so decidedly settled, in the cases of *Bloss* v. *Tobey*, 2 Pick. 320, and *Carter* v. *Andrews*, 16 Pick. 1, that it seems unnecessary to recapitulate them.

2. The other exception of the plaintiff is also, in the opinion of the court, untenable. The witness, after stating all that the defendant said, with all the attendant circumstances and connexions, was asked what meaning he understood the defendant to convey by these words. The judge very properly decided that the witness might testify to any existing facts or circumstances, to which the defendant alluded and referred, if any; but, having given the whole conversation, it was for the jury to determine what was meant by the language used, and that it was not competent for the witness to testify to his understanding of the defendant's meaning, in the language used. If the words, in their ordinary sense, according to the rules of language, imputed a charge of unchasteness and crime, or if, taken in their connexion with other facts or words, they would bear that meaning, we are to presume that the jury would so find. If in their natural import, or with accompanying words and facts, they would not bear

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that meaning, the witness's understanding of them could not legitimately govern or aid the jury, and would therefore be incompetent. It would be to make the defendant's liability depend, not on his own malicious intent and purpose, in using the language, which might be quite innocent and free from blame, but upon the misconception or morbid imagination of the person in whose hearing they were spoken.

Exceptions overruled.

ALVAH KIMBALL *vs.* ALBERT THOMPSON.

When one of two partners, with the consent of the other, sells and conveys one half of the effects of the firm to a third person, and the other partner afterwards sells and conveys the other half to the same person, such sales and conveyances are not *prima facie* void, as against the creditors of the firm, but are *prima facie* valid, against all the world, and can be set aside only by the creditors of the firm, upon their proving the transactions to be fraudulent as against them.

THIS was an action of replevin, to recover certain chattels which had been attached by the defendant, a deputy sheriff as the property of Edward H. Ashcroft and Henry B. Odiorne, partners, doing business under the firm of E. H. Ashcroft & Co. in Medford.

At the trial in the court of common pleas, before *Wells*, C. J. the plaintiff offered to prove that, before the defendant attached said chattels, he (the plaintiff) purchased of Ashcroft, one of the firm above named, with the consent of Odiorne, the other partner, one half of the effects of the firm, and paid Ashcroft therefor; and that he afterwards purchased of said Odiorne the other half of the effects of the firm, and paid him therefor; that he took possession of said effects under said purchases; and that the articles described in his writ of replevin were among the effects so purchased by him.

The judge ruled, that the plaintiff's title, thus acquired, was *prima facie* void as against the claims of the creditors of E. H. Ashcroft & Co., and a verdict was returned for the defendant. The plaintiff filed exceptions to the said ruling.

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I. Story, for the plaintiff.

Brinley, for the defendant.

Shaw, C. J. Nothing appears in the case to show that the sale, either by Ashcroft or Odiorne, to the plaintiff, was fraudulent as against their creditors. Ashcroft could sell his undivided interest, with the consent of his partner, Odiorne; and upon such sale, the plaintiff became owner of a moiety, and tenant in common with Odiorne. And so Odiorne could sell his moiety to the plaintiff, before any attachment or other claim of the creditors of the firm of Ashcroft & Co. intervened. This, it appears from the facts, was done; and it constituted a good title against the former owners, the partners, and *prima facie* a good title against all the world; to be defeated and set aside only by the creditors of Ashcroft & Co. by their showing the conveyance to be fraudulent as against them.

Verdict set aside, and a new trial ordered.

Jesse D. Pattee *vs.* Guy E. Greely.

An action cannot be maintained on a bond, which is executed, neither from necessity nor charity, on the Lord's day.

This was an action of debt on a bond, bearing date September 22d 1845, in which the defendant acknowledged himself to be bound to the plaintiff in the sum of $500. The condition of the bond was thus: "Whereas the said Pattee has this day taken a certain bread route, as follows, viz. in the town of Woburn, or the route leading thereto; in the town of Lynn, or the route leading thereto, and in the towns of Somerville, Charlestown, Cambridge, Boston and South Boston; and the said Greely agrees to quit the said routes, and give the same to the said Pattee for his own benefit: Now therefore, if the said Greely shall in all things well and truly keep and perform the covenants, and agreements and contracts herein stated, and shall not, either himself or through any other person, molest, interfere or interrupt said Pattee in

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the enjoyments of said routes, and the customers thereon, and does not sell, or cause to be sold, within said routes, bread of any description; then this bond or obligation shall be void; otherwise, shall remain in full force and virtue."

The defendant pleaded the general issue, and specified, as further ground of defence, (among other things,) that the bond declared on was made on the Lord's day, between sunrise and sunset of that day; the making thereof not being a work of necessity, charity or mercy.

The case was submitted to the court on the following facts agreed: "The defendant can prove, if it be legally competent for him to do so by parol evidence, that said bond was signed and delivered to the plaintiff, at his house, in the afternoon of the Lord's day, and before sunset, in October 1845; that the defendant, at the time, was residing in Charlestown, and went thence to West Cambridge, to execute the bond. Both parties were, at the time, in good health; and there is nothing to show that to execute the bond on that day was a work of necessity, charity or mercy. The plaintiff can prove that said bond was given for the consideration set out in his declaration, if it be legally competent for him to prove the same by parol evidence. After the execution of said bond by the defendant, and before the date of the plaintiff's writ, the defendant committed a breach of the condition of said bond."

Buttrick, for the plaintiff, cited *Geer* v. *Putnam*, 10 Mass. 312. *Clap* v. *Smith*, 16 Pick. 247. *Boynton* v. *Page*, 13 Wend. 425. *Adams* v. *Gay*, 10 Law Reporter, 348, since published in 19 Verm. 358. *Begbie* v. *Levy*, 1 Tyrw. 130, and 1 Crompt. & Jerv. 180.

E. R. Hoar & G. Farrar, for the defendant, cited 23 Amer. Jurist, 8 – 11. *Fennell* v. *Ridler*, 8 Dowl. & Ryl. 204, and 5 Barn. & Cres. 406. *Kepner* v. *Keefer*, 6 Watts, 231. *Bosworth* v. *Inhabitants of Swansey*, 10 Met. 363. *Smith* v. *Sparrow*, 4 Bing. 84. *Norton* v. *Powell*, 4 Man. & Grang. 42. *Fox* v. *Abel*, 2 Connect. 541, 560. *Lyon* v. *Strong*, 6 Verm. 219. *Lovejoy* v. *Whipple*, 18 Verm. 379. *Clough* v. *Davis*, 9 N. Hamp. 500. *Fox* v. *Mensch*, 3 Watts

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& Serg. 444. *Berrill* v. *Smith*, 2 Miles, 402. *O'Donnell* v. *Sweeney*, 5 Alab. 467. *Shippey* v. *Eastwood*, 9 Alab. 198.

Lord Ellenborough said, in *Langton* v. *Hughes*, 1 M. & S. 596, "it may be taken as a received rule of law, that what is done in contravention of the provisions of an act of parliament cannot be made the subject matter of an action."

Shaw, C. J. The plaintiff's counsel very properly admits that parol evidence may be received to prove that the bond was executed, not on the day when it bears date, but on another day, which was the Lord's day; so that we have only to decide whether the bond is void by reason of its being executed on that day.

The Rev. Sts. c. 50, § 1, enact that "no person shall do any manner of labor, business or work, except only works of necessity and charity, on the Lord's day." And the statement of facts admits that there is nothing to show that the execution of this bond was a work of necessity or charity. Was its execution "any manner of labor, business or work," within the meaning of the statute? Certainly it was. The legislature intended to prohibit secular business on the Lord's day, and did not confine the prohibition to manual labor, but extended it to the making of bargains, and all kinds of trafficking.

The general principle, that an action will not lie on a contract made in contravention of a statute, or of a principle of the common law, is well established, and has been repeatedly recognized and enforced in this Commonwealth. A leading case on this point is *Wheeler* v. *Russell*, 17 Mass. 258. A contract, the making of which is illegal, cannot be the subject matter of an action. Considerations of public policy require the enforcement of this rule, although both parties have joined in the violation of the law, and the defendant may be as much in fault as the plaintiff. It is not for the defendant's sake that the objection is ever allowed. In *Morck* v. *Abel*, 3 Bos. & Pul. 38, Lord Alvanley said, "no man can come into a British court of justice to seek the assistance of the law, who founds his claim upon a contravention of the British laws."

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The bond now in suit was made in contravention of the statute respecting the observance of the Lord's day, (Rev. Sts. c. 50,) and clearly falls within the principles above stated. In *Bosworth* v. *Inhabitants of Swansey*, 10 Met. 363, it was decided that a person who travels on the Lord's day, neither from necessity nor charity, cannot maintain an action against a town for an injury received by him, whilst so travelling, by reason of a defect in a road which the town is bound to keep in repair. And in *Robeson* v. *French*, 12 Met. 24, it was decided that a plaintiff, upon whom a deceit had been practised in an exchange of horses on the Lord's day, could not maintain an action against the party who had deceived him. In this last case, the case of *Geer* v. *Putnam*, 10 Mass. 312, which has often been supposed to support a different doctrine, was put upon its proper ground, and shown not to be at variance with the doctrine which we now hold.

The numerous cases, cited by the defendant's counsel, show that the principle which we apply to the present case has been applied, in England and in the other States of the Union, with great uniformity. And we have seen several other cases, published since the argument, in which the courts in our sister States have decided that an action cannot be maintained on a contract made on the Lord's day, if it be not made from necessity or charity.*

Judgment for the defendant.

* *Dodson* v. *Harris*, 10 Alab. 566. *Saltmarsh* v. *Tuthill*, 13 Alab. 390. *Towle* v. *Larrabee*, 13 Shepley, 464. *Adams* v. *Hamell*, 2 Doug. (Michigan) Rep. 73. *Link* v *Clemmens*, 7 Blackf. 479 But see *Swisher's Lessee* v. *Williams's Heirs*, Wright, 764.

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HENRY VANDINE *vs.* NATHANIEL BURPEE & another.

On the trial of an action to recover damages for injury done to the plaintiff's garden and nursery, by the smoke, heat and gas, proceeding from the defendant's brick kiln, after two gardeners, who had much experience in raising and cultivating fruit trees, shrubs and plants, had testified to the particulars of the plaintiff's injury, they were asked by the plaintiff, "what was the amount of damage" caused by the injury to which they had before testified. *Held*, that these witnesses might give their opinion as to the amount of such damage.

THIS was an action of trespass upon the case, brought against Amos Binney and Nathaniel Burpee, to recover damages for injury alleged to be done to the plaintiff's garden and nursery in Cambridge, by smoke, heat and gas, proceeding from their brick kilns, made and burnt in a brick yard near said garden. The defendants severally pleaded the general issue.

At the trial in the court of common pleas, before *Merrick*, J. it appeared that said Binney and others were owners of the brick yard, and that he, for himself and as agent of his co-tenants, leased the same to said Burpee, who was in possession thereof, under such lease, at the several times of the burning of the kilns complained of by the plaintiff; that the brick yard had been used for the same purpose, for several preceding years; that the plaintiff's garden and nursery were begun and planted by him, after the lot of land, which constituted the brick yard, had been appropriated and used for the purpose of making bricks and burning brick kilns thereon; that in June and July 1845, said Burpee made and burnt a kiln of bricks, in said yard, containing from fifteen to twenty arches of about fifteen thousand each; and that, for three or four days, while the kiln was burning, the weather was lowery, and the wind blew strong from the northeast, so as to take the smoke, heat and gas, from the kiln, over and upon the plaintiff's garden and nursery.

The witnesses did not agree in their statements as to the distance of the kiln from the garden, "but variously stated it o be from one hundred and twenty to more than two hundred

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feet." It appeared that the garden was surrounded by a close board fence, from seven to twelve feet high.

The plaintiff introduced evidence tending to show the injury to his garden and nursery, of which he complained in his declaration, and that it was occasioned by the smoke, heat and gas from the aforesaid brick kiln, while the same was in the process of burning. The defendants introduced evidence, for the purpose of showing that the alleged injury was not caused in that way, but was occasioned by other causes. This question of fact, together with the question of damages, was submitted to the jury, under instructions not objected to, and a verdict was rendered for the defendant Binney, and against the defendant Burpee, for $993 damages.

The defendants, on the trial, introduced, as witnesses, Thomas Willett and Samuel Walker, two experienced gardeners, who had spent much time in raising, grafting and cultivating fruit trees, shrubs and plants, and who had examined the plaintiff's garden and nursery, in July 1845, after the burning of Burpee's brick kiln. They testified, without objection from the defendants, to the injury to the trees, fruit and vegetation, which they severally noticed at the time of their examination, and that, in their opinion, such injury would be likely to be produced by the smoke, heat and gas from the burning of said brick kiln, in the state of the weather before mentioned. And they were thereupon inquired of by the plaintiff, what was the amount of damage, by the injury of which they had before testified. This question was objected to by the defendants, as being mere opinion as to the amount of damage; but the court ruled that it was admissible, and the question was put to, and answered by, each of said witnesses.

The defendant Burpee alleged exceptions to the ruling of the court.

Buttrick, for Burpee. The testimony of Willett and Walker, which was objected to, was inadmissible. The facts, to which they testified, in minute detail, were proper evidence for the jury to weigh; but their opinions, as to the amount

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of damage done, were not legal evidence. It was for the jury to assess the damage, upon their own judgment, formed from the facts testified to. The witnesses were not experts; and no case is to be found, in which such opinions have been allowed to be given in evidence. 1 Greenl. on Ev. § 440. *Jameson* v. *Drinkald*, 12 Moore, 148. *Cottrill* v. *Myrick*, 3 Fairf. 222. *Webber* v. *Eastern Rail Road Co.* 2 Met. 147. *Griffin* v. *Brown*, 2 Pick. 304. *Davis* v. *Mason*, 4 Pick. 156. *Needham* v. *Ide*, 5 Pick. 510. *Rider* v. *Ocean Ins. Co.* 20 Pick. 259. *Boies* v. *McAllister*, 3 Fairf. 308. *Lester* v. *Town of Pittsford*, 7 Verm. 158. 2 U. S. Digest, Evidence, 1262 – 1287. In *Norman* v. *Wells*, 17 Wend. 136, 163, it was held, in an action for a breach of covenant, that the opinion of witnesses, as to the probable amount of damages, is not admissible. Cowen, J. said, "even where a witness is able to speak to all the facts of the particular case, his opinions are not to be received." See also *Lincoln* v. *Saratoga & Schenectady Rail Road Co.* 23 Wend. 425.

The decisions are conflicting on the question whether a witness can testify to the value of property. But if he may, yet it does not follow that he may testify as to the amount of damages.

Mellen & E. R. Hoar, for the plaintiff. In New Hampshire, it is held that the value of property is never to be testified to by a witness. *Whipple* v. *Walpole*, 10 N. Hamp. 130. *Beard* v. *Kirk*, 11 N. Hamp. 397. But it is held otherwise in Maine, New York and Pennsylvania. *Warren* v. *Wheeler*, 8 Shepley, 484. *Brill* v. *Flagler*, 23 Wend. 354. *Kellogg* v. *Krauser*, 14 S. & R. 137. In this last case, Tilghman, C. J. said, that though an opinion of the value of land is not strictly a fact, yet "such opinions are every day received as evidence, and it is difficult to conceive how the value of land can be proved without them. It is a kind of evidence so commonly admitted, without dispute or objection, that I have no doubt of its legality." If witnesses may give their opinion as to the value of property, it would seem that they should also be allowed to give their opinion of the damage caused by the loss of property.

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DEWEY, J. The only objection, now urged to the ruling at the trial, is the admission of the testimony of Willett and Walker, as to their opinion of the amount of damages sustained by the plaintiff, by the injuries which they had already specified in detail.

As a general rule, witnesses are to testify to facts, and the jury are to draw the inferences and form the opinions which are to govern the case. In the application of this principle, it has been sometimes supposed that it should be carried so far as to exclude the opinion of witnesses as to the value of property which is in controversy; and decisions to this effect are found in the New Hampshire Reports. 3 N. Hamp. 349. 6 N. Hamp. 462. 10 N. Hamp. 130. 11 N. Hamp. 397. The cases cited from 8 Shepley, 23 Wend. 354, and 14 S. & R., sanction the contrary doctrine.

It seems to us that it would be impracticable to dispense with this species of testimony, in many actions of trover for personal property, where no detail of facts could adequately inform the jury of the value of the articles. The opinion of a witness, as to the value of a horse, is much more satisfactory evidence than a detailed statement of his size, color, age, &c. to give the jury the requisite information, to enable them to assess damages for the conversion of such a horse. In the present case, the evidence of opinion was offered under the most favorable circumstances for its admission. The witnesses were men having practical experience with the subject of cultivating fruit trees and shrubs; they had already stated, in detail, to the jury, the nature and extent of the injury, so far as description of that kind could give information; and to this they were allowed to add also their opinion as to the amount of damage occasioned by the injury, of which they had before testified.

The court are of opinion that the testimony was competent. *Exceptions overruled.*

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Thomas J. Drake *vs.* City of Lowell.

A city is liable, under Rev. Sts. *c.* 25, § 22, to pay damages to a person who receives an injury by the fall of an awning projected over the sidewalk of a street by the owner of a building, if the awning be dangerous to travellers for the space of twenty four hours before the injury happens.

Trespass upon the case to recover damages for an injury sustained by the plaintiff, by reason of defects and incumbrances in and over a public sidewalk on Merrimack Street in Lowell. Trial before *Hubbard*, J. who made the following report thereof:

"The defendants admitted that said street, including the sidewalk, was at the time of the injury, and for a long time before had been, a public highway in and through a compact part of Lowell. The plaintiff admitted that the title to the land contiguous to and under the sidewalk, where the injury was received, was in John Nesmith, who erected thereon, several years since, a brick building, containing three stores, fronting and adjoining the said street.

"It appeared that the sidewalk was of brick, fifteen feet in width, and extended along the whole length of the building. It also appeared that in May 1843, one of the tenants, who occupied a store in said building, made and extended from the building, into the street, over the public sidewalk, an awning constructed of boards and pine timber three or four inches square, for shade to the windows and doors of the basement story of the building. The rafters, extending from the building, were supported on the outer edge, towards the centre of the street, by posts standing in the edge of the sidewalk; and both posts and rafters were of the dimensions above named. The awning, on the top, was covered with boards, and was more than fifteen feet wide, and nearly fifty feet in length.

"It was conceded by the parties, that prior to the injury to the plaintiff, the said tenant had removed from the store, leaving the same in the occupancy of another tenant of said Nesmith.

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"Evidence was introduced, tending to prove that in the months of November and December 1844, and January 1845, there were several snows, amounting in the whole to the depth of twenty eight inches; and that the last of these snow storms ended on the twenty second day of said January, at which time the snow fell to the depth of four inches.

"It further appeared in evidence, that on the evening of the twenty fourth of the same January, the awning, being incumbered with large quantities of snow and ice, fell upon the plaintiff, and crushed him down upon the sidewalk, with the boards, timbers, snow and ice upon him, he being lawfully travelling on foot, in and through said highway; by means of which, it appeared that he was greatly injured, and that, for a considerable time, he was sick and lame, and wholly unable to do his usual labor and business, for the term of three months next ensuing.

"It further appeared, that the defendants, for the last fifteen or sixteen years, had used and repaired said street, as a common highway, and had passed an ordinance for the prevention of abuses in the public streets, containing regulations applicable to sidewalks generally, and had, since the accident in question, adopted or passed several other by-laws applicable to sidewalks and awnings. And also that one of their by-laws, passed in March 1840, contained the following section: 'No person shall place or establish any awning or shade before his or her place of business or dwelling-house, over any part of any street or sidewalk, unless the same be safely fixed and supported, so as in no wise to incommode passengers, and so that the lowest part of such awning or shade shall be at least seven feet in height above the sidewalk or street.' And it was conceded, for the purposes of the trial, that the awning in question was of the height required by that section, and that, when it was first built, it was safely fixed and supported.

"It also appeared in evidence, that for several days next prior to the day of the injury complained of, the awning had been incumbered with snow and ice, and that, on the morning of that day, it had been discovered by one witness, that

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the rafters were considerably bent by the weight, and one of them broken.

"To prove notice to the defendants, the plaintiff introduced a witness, who testified that he was superintendent of streets in Lowell, for the two years ending in April 1845; that on the 20th or 21st of January 1845, and three or four days prior to the injury to the plaintiff, he (the witness) discovered that the awnings generally, on the north side of Merrimack Street, including the one in question, were incumbered with snow and ice, and in a shattered and unsafe condition, of which he then gave immediate notice to the city marshal. And there was other testimony in the case, tending to show notice to the defendants of the said defects and incumbrances.

"Upon the foregoing evidence, the defendants contended that the defects and incumbrances proved were insufficient to render the defendants liable, and that therefore the suit could not be maintained. Upon which the presiding judge, for the purpose of bringing the question of law, as to the liability of the defendants, before the whole court, advised a nonsuit, subject to their opinion upon the foregoing facts. If the defendants are liable, the nonsuit is to be taken off, and a new trial granted; otherwise, the nonsuit is to be confirmed."

This case was argued at the last October term.

Caverly, for the plaintiff. The defendants are liable to the plaintiff, on the Rev. Sts. *c.* 25, §§ 1, 22, 24. If they are not liable, he has no remedy. See *Bigelow* v. *Weston*, 3 Pick. 267, 269. *Loker* v. *Brookline*, 13 Pick. 343, 346 *Currier* v. *Lowell*, 16 Pick. 174. *Worster* v. *Proprietors of Canal Bridge*, 16 Pick. 541. *French* v. *Inhabitants of Brunswick*, 8 Shepley, 29. *Springer* v. *Inhabitants of Bowdoinham*, 7 Greenl. 442.

The case of *Frost* v. *Inhabitants of Portland*, 2 Fairf. 271, cannot be distinguished, in principle, from the case at bar. The liability is on the defendants, in the first instance, though they may have a remedy over, against the owner of the awning. *Rex* v. *Inhabitants of St. George. Hanover Square*, 3 Campb. 222.

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The defendants made the awning their own, by not removing it, as they ought to have done. See *Holley* v. *Winooskie Turnpike Co.* 1 Aik. 74, 80. *Perley* v. *Chandler*, 6 Mass. 456.

S. Ames, for the defendants. The plaintiff, in order to entitle himself to recover, must not only show that he received an injury, while he was using due care, but must also show that the defendants have been guilty of some breach of a duty imposed on them by statute. The Rev. Sts. *c.* 25, do not make towns insurers. By § 22, there must be a "defect, or want of repair," for twenty four hours, before the party, that is by law obliged to make repairs, can be held liable for an injury received by reason of any defect, or want of repair. In the present case, no omission of the defendants' duty is shown The street and the sidewalk, for aught that appears, were in good repair. The occupant of the building had a right to make the awning; for it violated no existing law. The owners of land adjoining a highway may do any thing that is not inconsistent with the public easement. *Copp* v. *Neal*, 7 N. Hamp. 275. *Stevens* v. *Whistler*, 11 East, 51. *Stackpole* v. *Healy*, 16 Mass. 33. *Perley* v. *Chandler*, 6 Mass. 456. *Atkins* v. *Bordman*, 2 Met. 457. *O'Linda* v. *Lothrop*, 21 Pick. 292.

The plaintiff is not remediless, as his counsel supposes, .hough he cannot recover of the defendants. See *Smith* v. *Smith*, 2 Pick. 621.

Dewey, J. The defendants insist that no legal liability attaches to them for the damage sustained by the plaintiff. The only question arising in the case is, whether the provisions of Rev. Sts. *c.* 25, § 22, apply to a case like the present. If so, and the duty devolves upon the municipal officers of a city to see that "all highways shall be kept in repair, so that the same may be safe and convenient for travellers, at all seasons of the year," the liability of the defendants would seem to be easily established. It is said that the street was in good order; that no obstruction or want of repair existed on the sidewalk; and that every thing being thus well on the actual

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travelled path, the city is not to be made responsible for an injury occasioned by acts of others in placing insecure projections from buildings adjacent to the public streets, but so far elevated above the sidewalk, as not to interfere with the ordinary use of the same by the traveller. It is also further urged, that the owner of the land adjacent to a public street, and especially one who has the fee of the land on which the sidewalk is constructed, (the city having only an easement for a public street,) may erect and maintain such projections, extending from the adjacent building over such sidewalk.

It is upon considerations of this character, strengthened by the very general practice so long permitted in large towns and cities, where real estate is so valuable, of making such projections overhanging the public sidewalks, that it is now strongly pressed upon us, that the owners and occupants of such projections are alone responsible for an injury occasioned by their defective construction originally, or want of subsequent repair.

We can entertain no doubt that the general provision of the Rev. Sts. *c.* 25, § 1, requiring that the highways be kept in a state safe and convenient for travellers at all times, is alike applicable to the city and the town. To effect this object, § 3 confers full power upon every surveyor of highways "to remove all gates, bars, enclosures, or other things, that shall in any manner obstruct or incumber any highway, or incommode or endanger persons travelling thereon." This provision would of itself confer the power to remove all projections that endanger the persons passing in the street.

The duty imposed upon the city in this respect is essential to the safety of the traveller, and is not an unreasonable burden. To subject the city to an action for damages occasioned by such causes, there must have been a defect or want of repair in the projection, of such a nature as rendered its continuance dangerous to the public safety.

The supervision of all such projections is properly placed in the hands of the city officers, who have the power to cause their removal, whenever it shall become necessary for the

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safety of the traveller. They may be always regulated by the city ordinances, and the security of the city be properly guarded by by-laws, imposing suitable penalties upon all persons who shall, by such erections, endanger the safety of the traveller.

The court are therefore of opinion that the nonsuit be taken off, and a new trial granted.

SAMUEL HOLMAN *vs.* INHABITANTS OF TOWNSEND.

An action cannot be maintained against a town for damages alleged to have been caused to the plaintiff by the obstruction of a road by snow, by reason whereof he was prevented from travelling on the road, with his cattle and teams, and on foot, and from transporting his logs and timber to a saw mill, and from otherwise working in his wood lot, and about his logs and wood: And a declaration, setting forth such cause of action, is bad on demurrer.

THIS was an action of trespass upon the case, originally brought before a justice of the peace, in March 1846, by an inhabitant of Lunenburg, in the county of Worcester, a town adjoining Townsend, for an alleged injury caused by the obstruction of a highway by snow and ice. The defendants demurred to the plaintiff's declaration, and the justice overruled the demurrer, and gave judgment for the plaintiff, for five dollars damage, and costs of suit. The defendants thereupon appealed to the court of common pleas; and in that court the plaintiff, by leave first obtained, filed a new declaration, as follows: "For that the said defendants, on the twenty first day of February, A. D. 1846, and from that time until the third day of March, A. D. 1846, did suffer and permit the public highway, situate in said Townsend, and leading from the middle of said Townsend, and by the house of one Asa Graham, to the line of said town of Lunenburg, which highway is the usual and accustomed highway of said Holman to the saw mill of Powers and Adams, and to the centre of the town of Townsend, and which highway said defendants were then, and are now, bound by law to repair,

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to be, continue and remain unsafe, out of repair, and impassable, by reason of being obstructed and incumbered with snow and ice, although they had reasonable notice thereof. By means whereof, said plaintiff was, during all that time, hindered and prevented from travelling that way, with his horses, cattle, teams, and on foot, and otherwise, and thereby prevented and hindered from hauling and sledding a great quantity of logs and timber, the property of said plaintiff, to said mill, in order that they might there be sawed into lumber; and also from otherwise working in his woodlot, and about his logs and wood, being in and near said woodlot; and thereby so injured in his property." The defendants demurred to this declaration, and the plaintiff joined in demurrer. The demurrer was sustained by the court of common pleas, and judgment was rendered for the defendants. The plaintiff appealed to this court.

Worcester, in support of the demurrer. The defendants rely on the single objection, that the declaration alleges no special damage which will sustain an action. In *Paine* v. *Patrich*, Carth. 194, the doctrine is thus laid down: "If a highway is so stopped, that a man is delayed in his journey a little while, and by reason thereof he is damnified, or some important affair neglected; this is not such a special damage for which an action on the case will lie; but a particular damage to maintain this action ought to be direct, and not consequential; as, for instance, the loss of his horse, or by some corporal hurt, in falling into a trench in the highway." All the books sustain the same doctrine. *Hubert* v. *Groves*, 1 Esp. R. 148. *Stetson* v. *Faxon*, and *Thayer* v. *City of Boston*, 19 Pick. 147, 511. *Fineux* v. *Hovenden*, Cro. Eliz. 664. *Barr* v. *Stevens*, 1 Bibb, 292. *Pierce* v. *Dart*, 7 Cow. 609. *Anon.* Mo. 180, pl. 321.

No action can be maintained against a town, by the common law, for a defect in a road. *Russell* v. *The Men of Devon*, 2 T. R. 667. *Mower* v. *Inhabitants of Leicester*, 9 Mass. 247. *Tisdale* v. *Inhabitants of Norton*, 8 Met. 388. Such action lies only by force of the Rev. Sts. *c.* 25.

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B. Russell, for the plaintiff. This action is founded on the Rev. Sts. *c.* 25, § 22, which give an action to any person who receives an injury, in his person or property, "by reason of any defect, or want of repair." Obstruction by snow is a defect, within this provision. *Loker* v. *Inhabitants of Brookline*, 13 Pick. 343. And the plaintiff suffered such an injury as entitles him to redress by action. *Farnum* v. *Town of Concord*, 2 N. Hamp. 392. *Lansing* v. *Smith*, 4 Wend. 9. *Rose* v. *Miles*, 4 M. & S. 101. *Burrows* v. *Pixley*, 1 Root, 362. *Hughes* v. *Heiser*, 1 Binn. 463 *Mayor, &c. of Pittsburgh* v. *Scott*, 1 Barr, 309.

Shaw, C. J. The court are clearly of opinion that this action cannot be maintained on the Rev. Sts. *c.* 25, § 22. They give a remedy to any one who has received "any injury in his person or property by reason of any defect, or want of repair." The construction, which has been put on this provision, and which we consider a just one, is, that it must be a damage sustained in using the road, and also in using it with due care and skill. *Tisdale* v. *Inhabitants of Norton*, 8 Met. 388. *Adams* v. *Inhabitants of Carlisle*, 21 Pick. 146. The special damage, for which this statute gives a remedy, must be one of which the defect in the highway is the direct and proximate cause. That damage, which a party sustains, in consequence of not being able to use a highway, is one which he sustains, in common with all the rest of the community, from the failure of the town to perform a public duty, and can be properly redressed only by a public prosecution. Were it otherwise, every individual in the town or the adjoining towns, who owns a team or carriage, and would occasionally find it convenient to use the road, would have a separate action. Co. Lit. 56 *a*. 3 Mod. 294. 3 Wooddeson, 190.

Even in an action at common law, where one sues to recover special damage, for an injury sustained by an obstruction in a highway, it must be shown that his damage is special, and peculiar in kind, as by driving against a log; *Fowler* v. *Sanders*, Cro. Jac. 446; or falling into a ditch. Co. Lit 56 *a*. Carth. 194. The damage arising from being

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unable to use the way, being common to all the public, is not the ground of a private action. The distinction is well stated, and the authorities are reviewed, in the case of *Stetson* v. *Faxon*, 19 Pick. 147.

But an action at common law will not lie against a town; and, to recover damage, a party must bring his case within the statute. *Mower* v. *Inhabitants of Leicester*, 9 Mass. 247.

Judgment, on the demurrer, for the defendants.

SAMUEL BLANCHARD *vs.* HENRY KIMBALL.

Under *St.* 1840, *c.* 87, § 1, and Rev. Sts. *c.* 107, § 3, the question, whether a writ of entry is brought for the foreclosure of a mortgage, depends on the case, as disclosed by the proof, and not on the form of the writ.

A writ of entry, brought by a mortgagee, in the court of common pleas, in the form allowed by Rev. Sts. *c.* 107, § 3, may be amended, so as to show that the demandant claims possession against the tenant, under a mortgage.

WRIT OF ENTRY. The original count demanded of the tenant "possession of a certain parcel of land, situated in Woburn;" (described by metes and bounds;) "whereupon the said Blanchard says, that he was seized of the demanded premises, with the appurtenances, in his demesne as of fee, within twenty years last past, and ought now to be in quiet possession thereof; but the said Kimball hath since unjustly entered, disseized him thereof, and still withholds the same."

The action was commenced in the court of common pleas; and the tenant, at the return term, moved the court (held by *Wells*, C. J.) that the action might be dismissed, because the court had no jurisdiction thereof, "as appears fully from the declaration in said case." The demandant thereupon moved for leave to amend his count, by adding, after the words "in his demense as of fee," the words "and in mortgage." The court allowed the amendment to be made; and the tenant alleged exceptions.

Nelson, for the tenant. By *St.* 1840, *c.* 87, § 1, the supreme judicial court has "original and exclusive jurisdiction

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of all writs of entry, except for the foreclosure of mortgages." The demandant's original count was not for the foreclosure of a mortgage, and the court of common pleas had no jurisdiction of the action. The question is, whether that court can acquire jurisdiction by merely allowing an amendment.

Perry, for the demandant. It is doubtful, perhaps, whether any amendment was necessary. *Ingalls* v. *Richardson*, 3 Met. 340. But the amendment was allowable. In *Bell* v. *Austin*, 13 Pick. 93, it is said, that "where the court has jurisdiction of the persons and subject matter, the proceedings, without danger or injustice, may be shaped and varied so as to reach the justice of such case, between those parties," and an amendment be made. This was under *St.* 1784, *c.* 28, § 14. By the Rev. Sts. *c.* 100, § 22, matter of substance, as well as of form, may be amended. *Poyen* v. *McNeill*, 10 Met. 291.

Shaw, C. J. There is an obvious difficulty in carrying into effect the provision, in the jurisdiction act, (*St.* 1840, *c.* 87,) that the supreme judicial court shall have original and exclusive jurisdiction of all writs of entry, "except for the foreclosure of mortgages." The difficulty arises from the Rev. Sts. *c.* 107, § 3, which provide that "the mortgagee, in an action for possession, may declare on his own seizin, as in a writ of entry, without mentioning the deed of conveyance, or the condition or defeasance thereof," or stating his title as mortgagee. Of course, it cannot be determined by the writ, whether the suit is brought for the foreclosure of the mortgage. Even when the demandant's only title is a mortgage, his suit may be brought before breach of the condition, or against a stranger having no right to redeem; and then it is not a suit for the foreclosure of a mortgage. It depends on the case as disclosed by the proof, and not on the form of the writ. *Ingalls* v. *Richardson*, 3 Met. 340.

From this view, it is manifest that there are cases in which the court of common pleas has jurisdiction, and in which the count is general, as in the present case. It could not be

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known, until further proceedings, that this was not such a case. The tenant was therefore rightly summoned, and bound to appear and answer. The court had jurisdiction of the parties and the subject matter. The person and case could be rightly understood; Rev. Sts. c. 100, § 21; and therefore the court had full authority to allow an amendment. *Bell* v. *Austin*, 13 Pick. 93.

Whether the demandant might not have proceeded, without an amendment, it is not necessary to decide. On principle, it would seem that he might; because when, in the progress of the suit, he should come to show his title, it would appear to be a suit for the foreclosure of a mortgage. But the amendment, being rightfully allowed, puts the question beyond doubt. *Exceptions overruled.*

MARY L. CONNER *vs.* JOHN C. PALMER.

A constable has no authority, by Rev. Sts. c. 15, to serve a writ of replevin, except in a case where the sheriff or his deputy is a party to a suit in which the value of the property to be replevied does not exceed the sum of seventy dollars.

THIS was an action of replevin, in which the plaintiff's damages were alleged, in the writ, to be seventy dollars. The articles replevied were appraised at $26·92, by persons appointed and sworn pursuant to the Rev. Sts. c. 113, § 29. The writ was served by a constable; and on the return thereof into the court of common pleas, held by *Washburn*, J. at September term 1846, the defendant moved the court that the action might be dismissed, because (among other reasons) the writ was served by a constable; neither the sheriff, nor either of his deputies, being a party to the suit. The court dismissed the action, and the plaintiff filed exceptions.

B. F. Butler, for the plaintiff. By the Rev. Sts. c. 15, § 71, "any constable may serve, within his own town, any writ or other process, in any personal action, in which the damages shall not be laid at a greater sum than seventy dollars." By

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§ 73, constables may also serve writs of replevin, in cases where the value of the property to be replevied shall not exceed seventy dollars. In the present case, neither the damages alleged, nor the value of the property replevied, exceeded seventy dollars.

J. G. Abbott, for the defendant. By Rev. Sts. *c.* 15, § 71, constables can serve writs only where damages alone are sought. This is shown by § 73, which provides that they "may *also* serve writs of replevin," where the goods are not of more than seventy dollars' value, if the sheriff or his deputy shall be a party. The *St.* of 1789, *c.* 26, §§ 1, 4, gives the form of a writ for replevying cattle, and also for replevying goods. In the latter, the direction is to the sheriff or his deputy only; though, in the former, the direction is to constables as well as to the sheriff and his deputy. See *Jordan* v. *Dennis*, 7 Met. 590.

Shaw, C. J. This is an action of replevin for goods, in which the writ was originally returnable before the court of common pleas; and the question is, whether it was rightly served and returned by a constable.

This question depends upon the construction of the statute By Rev. Sts. *c.* 15, § 71, constables are authorized to serve writs and executions in any personal action, in which the damage is not laid higher than seventy dollars. This would seem to be sufficient to give the authority, if it stood alone. But it must be taken in connexion with the context and the subject matter. By the same chapter, enumerating in several sections the powers and duties of constables, it is provided by § 73, that "constables may also serve writs of replevin, in cases where the sheriff or his deputy shall be a party, and in which the value of the property to be replevied shall not exceed the sum of seventy dollars." This carries a strong implication, that in other cases the constable has not the authority. The jurisdiction of the sheriff is general, and limited only by specific exceptions. But the authority to the constable is given only in specific cases, which must appear on the face of the writ. This necessary implication qualifies

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the generality of § 71, so that it does not apply to actions of replevin, unless in cases where the value of the property does not exceed seventy dollars, *and* where the sheriff or his deputy is a party.

This conclusion, we think, is confirmed by a reference to the subject matter. In most personal actions, the matter ultimately claimed in the suit is a sum of money expressed in the *ad damnum*. The obvious purpose of the statute being to give constables a limited authority only to serve writs in civil cases, this may be well measured in most personal actions by the *ad damnum*. But it is otherwise in replevin, where specific property, often of great value, may be the subject of judicial controversy, whilst the damages are merely incidental, and may be comparatively small. On these grounds, the court are of opinion, that the writ was not legally served by a constable, and that the action was rightly dismissed by the court of common pleas. *Exceptions overruled*

CLARK TRAVIS *vs.* JONATHAN P. BISHOP.

When personal property is mortgaged, without a delivery thereof to the mortgagee, and the mortgage is not recorded, a party who buys the property of the mortgagor, and takes possession of it, though he has knowledge of the mortgage, will hold the property against the mortgagee.

TROVER for a horse. At the trial in the court of common pleas, before *Merrick*, J. the plaintiff gave evidence that the horse was conveyed to him, by Seth C. Hawes, by a mortgage dated January 11th 1845, (but which was never recorded,) as security for a debt due from said Hawes to him. He also gave evidence tending to show that the defendant, who purchased the horse of said Hawes, after the making of the mortgage, was fully informed thereof, and of its continued existence.

The defendant contended that, as he was a subsequent purchaser of the horse, for a valuable consideration, he was

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entitled to hold it against the plaintiff, because there never had been a delivery of the horse to the plaintiff. But the court ruled, and instructed the jury, that the plaintiff was entitled to recover, if the defendant, at the time of his purchase of the horse, was informed and notified of the transaction between the plaintiff and said Hawes, and of the making of the mortgage and its continued existence. The jury returned a verdict for the plaintiff, and the defendant filed exceptions to the ruling and instructions of the court.

G. M. Brown, for the defendant. The want of delivery of the horse to the plaintiff is alone fatal to his cause. By *St.* 1832, *c.* 157, § 1, and Rev. Sts. *c.* 74, § 5, "no mortgage of personal property shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to, and retained by, the mortgagee, or unless the mortgage be recorded," &c. Recording is the only substitute for possession. *Bullock* v. *Williams*, 16 Pick. 33. The contract between the plaintiff and Hawes would have been invalid, if it had not been in writing; and it is equally invalid for want of delivery. *Lanfear* v. *Sumner*, 17 Mass. 113. *Bonsey* v. *Amee*, 8 Pick. 236.

The defendant's knowledge of the mortgage cannot avail the plaintiff, against the express provision already cited from Rev. Sts. *c.* 74, § 5. But this question need not be decided, in the present case; the other ground of defence being sufficient. But if it were otherwise, and the defendant could be affected by notice of the mortgage, yet trover would not lie against him; for, on that view of the matter, he bought only an equity of redemption. See *Doe* v. *Allsop*, 5 Barn. & Ald. 142.

Train, for the plaintiff. There is no reason why any difference should be made as to the effect of actual notice of a mortgage of personalty, and of a deed conveying real estate. The defendant's contract with Hawes was fraudulent, as against the plaintiff, and he cannot avail himself of his own fraud, in defence. *Bonsey* v. *Amee*, 8 Pick. 236. *Smith* v. *Moore*, 11 N. Hamp. 55. The case of *Lunt* v. *Whitaker*, 1

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Fairf. 310, shows that trover is the proper action in this case and that retaining possession, after delivery, is not necessary.

Shaw, C. J. There having been no delivery of the horse, and no registration of the mortgage, the plaintiff has not established his title to the property, so as to maintain this action against the defendant, who claims under a sale and delivery, and is not a party to the mortgage. The provision in the Rev. Sts. *c.* 74, § 5, conforms, in terms, to *St.* 1832, *c.* 157, § 1, under which the court decided the case of *Bullock* v. *Williams*, 16 Pick. 33. That case proceeded on the ground that, by force of the statute, registration was sufficient to give effect to a mortgage of personal property capable of being identified by a written description. But it seems to be distinctly implied, from the case, that without either possession or registration, the mortgage could not be valid, either by common law or by statute. A new trial will be ordered, unless the plaintiff elects to become nonsuit.

Walter R. Mason & another *vs.* Abijah L. Wright & another.

An infant cannot be held to pay for grain furnished for horses owned by a firm of which he was a member, though the horses were employed in the usual business of the firm, and though he was emancipated by his father.

This was an action of assumpsit, brought against Abijah L. Wright and John S. Webber, partners, to recover the balance of an account. due from them to the plaintiffs, for grain and grain bags sold and delivered.

The parties submitted the case to the court, upon the statement of facts which follows: "The grain specified in the plaintiffs' claim was furnished to the defendants when they were engaged as copartners in doing business as teamsters and common carriers of goods, under the firm of Wright & Webber, by the plaintiffs, who then were engaged as copartners in doing business as traders and dealers in grain, under the firm

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of Mason & Brooks: The said Wright & Webber, at that time, jointly as copartners, owned several horses which were used by them in their said business: The grain, specified as above, was furnished to them for said horses, and was necessary food for said horses, and was used by the defendants in feeding them; and the bags, specified in the plaintiffs' claim, were used by the defendants, in carrying away said grain: The said Webber, when said articles were so furnished, as aforesaid, was a minor, under the age of twenty one years, to wit, about the age of twenty years; and he had then, and before he entered into said copartnership, and before he purchased said horses jointly with said Wright, been emancipated by his father; and a notice of such emancipation, signed by his father, had been then printed in a public newspaper in the county of Middlesex; and the said Webber had then left his father's house; and his father then claimed no interest in his earnings, or in said horses or partnership property: The said Wright was defaulted at the first term after this action was commenced. Judgment is to be rendered against said Webber, with said Wright, if the court shall be of opinion that said Webber is liable with said Wright; otherwise, judgment is to be rendered for said Webber, for his costs."

B. Russell, for the plaintiffs. The defendant Webber is answerable for the grain, as for necessaries. It was necessary for his horses, used in his business. In Story on Con. § 56, it is said, "the legal term 'necessaries' is not strictly limited to such things as are absolutely requisite for support and subsistence, but is to be construed liberally." See *Rainsford* v. *Fenwick*, Carter, 215. *Hands* v. *Slaney*, 8 T. R. 578. *Harrison* v. *Fane*, 1 Scott N. R. 287, and 1 Man. & Grang. 550.

A minor may be a member of a partnership, as wel as an adult. *Goode* v. *Harrison*, 5 Barn. & Ald. 147. *Whitney* v. *Dutch*, 14 Mass. 457. And as Webber was emancipated, he is liable for the debts of the firm, contracted while he was a member. If he had left the firm, he would have been

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entitled to half the property. No dissolution of the partnership is shown; and it is to be presumed that he has ratified the contract. *Boyden* v. *Boyden*, 9 Met. 519. *Boody* v. *McKenney*, 10 Shepley, 517.

Farley, for Webber. An infant is not bound to pay for goods bought to trade with. 1 Bl. Com. 466, Christian's note. Bayley, J. says, in *Thornton* v. *Illingworth*, 2 Barn. & Cres. 826, "in the case of an infant, a contract made for goods, for the purpose of trade, is absolutely void, not voidable only." On the same principle, he is not liable for any contract made for the purpose of carrying on his trade. 20 Amer. Jurist, 282, 283. He is liable for necessaries furnished to his wife; but if they are furnished before the marriage, he is not held to pay for them, though he uses them after marriage. *Turner* v. *Trisby*, 1 Stra. 168.

Emancipation does not enlarge his liability, nor in any way alter the case. *Inhabitants of Taunton* v. *Inhabitants of Plymouth*, 15 Mass. 203.

Shaw, C. J. The minor was not competent to enter into trade, and was not bound by the contract, though it was a partnership contract. The case is not distinguishable from that of *Tupper* v. *Cadwell*, decided on the present circuit. 12 Met. 559. In that case, we held that a minor was not legally bound to pay for repairs made on his dwelling-house, under a contract made by him, although the repairs were necessary to prevent immediate and serious injury to the house. The law deems a minor incompetent to make such contracts.

The emancipation by the father makes no difference in this respect. It was the mere renunciation of his own right to the services of the son, but did not enlarge the son's legal capacity.

According to the agreement of the parties, judgment is to e entered for Webber, for his costs.

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THOMAS P. SMITH & others *vs.* ASAHEL A. KELLEY.

An infant bought goods, that were not necessaries, and the sellers, three days before he came of age, brought an action against him for the price, and attached the goods on their writ: The goods remained in the hands of the attaching officer, at the time of the trial of the action, and the defendant gave no notice to the plaintiffs, after he came of age, of his intention not to be bound by the contract of sale. *Held*, that there was not a ratification of the contract of sale, by the defendant, and that the action could not be maintained.

ASSUMPSIT for goods sold and delivered. At the trial in the court of common pleas, before *Wells*, C. J. the defendant relied on his infancy, in defence, and the plaintiffs admitted that the goods sold by them to him were not necessaries. Both parties admitted that the goods were sold to the defendant on the 17th of December 1845; and the defendant introduced evidence that he was twenty one years old on the 7th of February 1846.

There was evidence tending to show that part of said goods were attached by the plaintiffs, on the writ in this suit, on the 4th of February 1846; and there was no evidence that the goods so attached had been restored to the defendant; but it appeared that they were held under attachment at the time of the trial.

The judge instructed the jury, that "if they believed the defendant did not arrive at the age of twenty one years until the 7th of February 1846, and that he had at no time, after he arrived at the age of twenty one years, the actual possession and control of any of the goods sold to him by the plaintiffs, yet if they believed that any part of the goods, so sold by the plaintiffs to the defendant, were attached on the plaintiffs' writ, on the 4th of February 1846, and possession of them was retained by the attaching officer, the defendant must be considered as having affirmed the contract of sale, after he became of full age, unless, within a reasonable time after becoming of age, he in some way notified to the plaintiffs his intention not to be bound by the contract, on the ground of infancy."

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The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions to the instructions given to the jury.

J. G. Abbott, for the defendant, was stopped by the court.

Wentworth, for the plaintiffs, cited *Boyden* v. *Boyden*, 9 Met. 519, and *Cheshire* v. *Barrett*, 4 McCord, 241.

Shaw, C. J. The infancy of the defendant, at the time the contract was made, being shown, and it being admitted that the goods sold were not necessaries, the defendant was entitled to judgment, unless the plaintiffs could prove a promise of the defendant, after he came of age, to pay the debt contracted whilst he was under age. The previous debt, founded on a contract, invalid in law for the cause that the defendant had not legal capacity to make it, would be undoubtedly a good consideration to support an express promise. A mere acknowledgment of the promise made in infancy is not sufficient. The act relied on as a ratification must amount to a promise or undertaking to pay it. *Ford* v. *Phillips*, 1 Pick. 202. *Smith* v. *Mayo*, 9 Mass. 64. In a recent case, *Boyden* v. *Boyden*, 9 Met. 519, cited by the plaintiffs' counsel, it was held, that when a promissory note was given by a minor, for personal property capable of being surrendered and restored, if the defendant, after coming of age, used the property as his own, or sold it, or kept it a long time, it was evidence from which a jury might infer an intent to ratify the contract; which he might elect to do. But, ratification being an entire act, if he did it in part, he must do it *in toto*. Such use of the property, therefore, would be evidence of a new promise to pay the debt. But this, we think, must be a voluntary act on the part of the minor; and in order that a jury may infer such promise from the act of the minor, after he comes of age, it must be a voluntary act which manifests his intention to keep the property, when he has the power to keep or relinquish it, at his election. If he had not such actual possession and control of the goods, or made no sale or disposition of them, after he came of age, and before action brought, there was no evidence on which a jury could find a

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new promise and ratification; and the burden being on the plaintiffs to prove such new promise, the issue must be for the defendant. If the defendant had no such possession of the goods, or power over them, or disposition of them, no notice, on his part, was necessary, of his intention to vacate the contract, in order to establish his defence.

The directions of the judge to the jury having been contrary to these views, the court are of opinion that they were incorrect; that the verdict was wrong, and must be set aside; and that a new trial be granted, to be had in this court, unless the plaintiffs shall elect to become nonsuit.

The Lexington & West Cambrigde Rail Road Company *vs.* William Chandler.

An act incorporating a rail road company provided that the capital stock should not exceed two thousand shares; that no assessments should be laid on the shares to a greater amount, in the whole, than one hundred dollars; that the number of shares should be determined, from time to time, by the directors; and that as soon as two hundred and fifty shares should be subscribed, the company should proceed to construct and open the road: C. subscribed for five shares, and the directors, after more than two hundred and fifty shares were subscribed, voted to close the subscription books of the capital stock, and passed no other vote fixing the number of shares: C. paid six assessments on his shares, but neglected to pay the seventh, and the treasurer of the company, pursuant to the Rev. Sts. *c.* 39, § 53, sold said shares at auction, for a sum insufficient to pay said assessment, and the company thereupon brought an action against C. to recover the deficiency. *Held*, that the vote of the directors to close the subscription books for shares, on a given day, was in effect a vote fixing the number of shares at the number then subscribed for, as acertained by said books, and lawfully fixed the number for the time being; that C.'s shares were legally liable to assessment; and that he was answerable for the deficiency sued for.

When a defendant is sued as a stockholder in a rail road corporation for the sum remaining due on an assessment upon his shares, after they are sold for non-payment of the assessment, it is competent and sufficient, for the purpose of showing him to be such stockholder, and liable for the assessment, to give evidence that he signed a subscription paper for shares, before the corporation was organized, that he attended the meeting of the stockholders for the organization of the corporation, and that he wrote and distributed votes, and himself voted, for directors.

A by law of a rail road corporation provided, that in case of a sale of shares for non-payment of assessments, the treasurer should give notice to the delinquent owner, when his residence was known, of the time and place of sale, by letter seasonably put into the mail. *Held*, that this by-law was directory to the

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treasurer, and not a condition precedent; and that a written notice of the time and place of sale, signed by the treasurer, and delivered to the owner of the shares or left at his dwelling-house, and received by him as soon as he was entitled to receive it by mail, was sufficient.

Shaw, C. J. This is an action brought by the rail road company to recover of the defendant the balance due on a seventh assessment of ten dollars, on five shares of the capital stock of the company, subscribed for by him. The action is founded on the provisions of the Rev. Sts. c. 39, § 53, to recover the difference between the amount of the said assessment and the sum at which said five shares were sold; the same having been sold, by order of the directors, as delinquent shares.

The trial was had in the court of common pleas, before the chief justice; and the case comes before us on exceptions to the rulings of the presiding judge. Upon one of those rulings the defendant obtained a verdict; and to that ruling the plaintiffs alleged exceptions. But in an earlier stage of the trial, the defendant had alleged exceptions to other rulings of the judge; and all the exceptions are now before us. Those of the plaintiffs, though last in the order of time, will be considered first.

The defendant objected to the right of the company to recover, because the directors had not, by a vote, pursuant to the plaintiffs' act of incorporation, (*St.* 1845, c. 186,) fixed the number of shares, of which the capital stock of the company should consist. The judge ruled that this objection was fatal; and it was upon this ruling that a verdict was found for the defendant.

The provision in § 3 of the act of incorporation is, that "the capital stock of said company shall not exceed two thousand shares, the number of which shall be determined from time to time, by the directors thereof, and no assessments sha.. bə laid thereon of a greater amount, in the whole, than one hundred dollars on each share." It appears by the facts in the case, that the directors caused subscriptions for shares o be opened, and on the 7th of August 1845, more than 250

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shares being then subscribed, voted to close the subscription books of the capital stock; and no other vote was passed fixing the number of shares of which the capital should consist.

The ground upon which the defendant's argument rests is this; that until the whole number of shares is determined, no assessment can be laid on any of the shares subscribed for; that, in effect, the subscription is a provisional undertaking only, that the subscriber will pay such sum as his share bears to the whole number of shares; and if that number is not subscribed for, he may be liable for a larger proportion. *Salem Mill Dam Corporation* v. *Ropes*, 6 Pick. 23, and 9 Pick. 187. *Central Turnpike Corp.* v. *Valentine*, 10 Pick. 142. *Proprietors of Newburyport Bridge* v. *Story*, 6 Pick. 45, *note.* But we think the present is not within the principle of those cases. In each of them, the number of shares, of which the capital should consist, was fixed unalterably by the act of incorporation, and the proportionable liability of each share could not be fixed till the whole were taken up. But the act of incorporation of the present plaintiffs is very different. Section 3 provides that the number shall not exceed two thousand, and that the liability of each shareholder shall not exceed one hundred dollars on each share. Section 4 provides that the company shall commence the construction of the road when two hundred and fifty shares are subscribed; and by § 3, the number of shares "shall be determined, *from time to time*, by the directors." Taking these provisions together, they constitute a system entirely different from those cited. The security of the subscriber is in the provision limiting the amount to which he may be assessed. The security for the enterprise is found in the provision authorizing the directors to enlarge and fix the number of shares, so as to furnish the capital required to complete the work, and expressly authorizing and requiring them to proceed when two hundred and fifty shares are subscribed. Of course, each subscriber, when he subscribes, knows that he

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will be liable to assessment, when this number is taken, and, by subscribing, assents to the terms.

The court are of opinion, that the vote of the directors, to close the books of subscription for shares, on a given day, there being then more than two hundred and fifty subscribed for, was in effect a vote fixing the number of shares at the number then actually subscribed for, as ascertained by the books, and that this lawfully fixed the number for the time being. From the nature of the case, the words "from time to time" authorized an enlargement, but could not authorize a reduction of the number. The number of shares being capable of being ascertained with certainty, the vote referring to them was sufficiently certain.

It may be important, with a view to a new trial, to consider the exceptions taken by the defendant.

1. Evidence was offered, tending to show that the defendant signed a subscription paper for five shares, before the organization of the company; that he was present at the meeting of the stockholders for the organization of the corporation, wrote and distributed votes, and voted for directors. The defendant objected to the subscription paper as evidence, on the ground that no valid or binding promise could be made to the corporation, before its organization; and that parol evidence was not sufficient to show that the defendant had made himself a subscriber to the corporation for any shares, or that he became a member of the corporation, by the transactions stated. This objection was overruled, and the subscription paper and acts of the defendant were admitted, as evidence of a ratification of his prior subscription.

We think this decision was correct. The action is not founded on a supposed common law obligation, arising from a promise to take and pay for a number of shares named; but it is founded on a statute liability, created by the act of incorporation, binding upon all its members. The question is not, whether this subscription was a good promise at common law, made to a proper party, and on a good consideration; but

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whether he was a member of the corporation and a holder of five shares. And for this purpose the evidence was competent. He may be proved to be a member of the corporation, by being a petitioner for the act, or, being within the description of persons incorporated, by acting under it, and assisting to carry it into execution. *Ellis* v. *Marshall*, 2 Mass. 269. The subscription paper, though made before the organization of the corporation, was made after the act of incorporation was passed, and was *prima facie* proof, competent and proper to go to the jury, both to prove the fact of his being a member of the corporation, and of the number of shares held by him, and, in the absence of any countervailing proof, decisive.

2. The other exception of the defendant is, that he was not notified of the intended sale of his shares, for the non-payment of assessments, by a letter sent to him by mail. This is founded on the sixth article in the by-laws of the corporation, which directs that "in case of sale, the treasurer shall notify the delinquent owner, when his residence is known, of the time and place of sale, by letter seasonably put into the mail; and his certificate that notice has been duly given shall be full evidence of the fact."

It appears, that a written notice, signed by the treasurer, was delivered to the defendant, or left at his dwelling-house, but that no notice of such sale was sent through the post office. The court decided that the notice given was sufficient, provided the jury were satisfied, that it was in fact received by the defendant, as soon as he was entitled to receive it by mail. We think this was right. The by-law intended to provide an easy, convenient, and, under ordinary circumstances, a certain mode of giving and proving notice; but it was directory to the treasurer, and not a condition precedent. The by-law contains no negative words, and neither expressly, nor by implication, declares no other notice sufficient. The mode indicated by the by-law would be only constructive notice, and was not, we think, intended to take away the effect of actual personal notice.

It is sufficient thus to express an opinion upon the subject

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of the defendant's exceptions; but the plaintiffs' exceptions being sustained, the verdict is set aside, and a new trial ordered in this court.

Nelson & G. Farrar, for the plaintiffs.

Buttrick, for the defendant.

Mary Wyman *vs.* The Lexington & West Cambridge Rail Road Company.

The provision in Rev. Sts. *c.* 24, § 19, that jurors for the assessment of damages caused by the laying out of a highway shall be taken from "the three nearest towns not interested," means the three towns nearest to the town in which the land lies, over which the highway is laid out: And by Rev. Sts. *c.* 39, § 57, this provision is extended to jurors for the assessment of damages caused by the laying out of a rail road.

Under Rev. Sts. *c.* 24, § 15, and *c.* 39, § 57, which direct that when two or more persons apply, at the same time, to the county commissioners, for a jury to assess damages caused by the laying out of a highway or rail road, "the said commissioners shall cause all such applications to be considered and determined by the same jury," the most proper course for the commissioners is, to issue a single warrant to an officer, reciting all the cases that are to be heard by the jury: If separate warrants for each case be issued by the commissioners, yet if the officer summon a single jury, who hear and determine each case, their verdicts will not be set aside merely because several warrants were irregularly issued.

When several applications are made, at the same time, by owners of lands in different towns, for a jury to assess damages caused by the laying out of a highway or rail road, the jurors are to be taken from three towns nearest to the town in which the land of either of the applicants is situate: And when a single application, for such purpose, is made by one who owns lands in different towns, the jurors are to be taken from three towns nearest to either of the towns in which his lands are situate: This is all that is practicable under Rev. Sts. *c.* 24, § 15, and *c.* 39, § 57.

It is not necessary that notice to jurors, who are drawn to assess damages caused by the laying out of a highway or rail road, should be served by a constable: Such notice may be served by the officer to whom the warrant for summoning a jury is directed.

On the hearing, before a jury summoned to assess damages caused to A. by the laying out of a rail road over his land, he may give evidence of the price paid by the rail road company for the adjoining land of B. purchased by them: But an owner of adjoining land cannot legally be permitted to state to the jury what, in his judgment, is the value of that land, though he be a farmer who has occasionally bought and sold land; and if he be permitted to make such statement, the verdict of the jury will be set aside, although they were instructed, that opinions, except of experts, were not evidence, and that the facts and reasons on which any opinion or judgment was formed, were the evidence on which they must form their opinion.

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Wyman v. Lexington & West Cambridge Rail Road Co.

This was a proceeding upon a petition for a jury to assess damages sustained by the petitioner by the laying out of the respondents' rail road over her land in the town of West Cambridge. The petition was presented to the county commissioners in September 1846, and they issued a warrant, directed "to any deputy sheriff of our county of Middlesex, Samuel Chandler, Esq. sheriff of said county, being interested," to summon a jury, agreeably to law, to estimate the petitioner's damages. A deputy sheriff thereupon proceeded to execute the warrant, by causing jurors to be drawn by the proper authorities of Cambridge, Watertown and Somerville, three towns nearest to West Cambridge, and by summoning said jurors to appear, &c.

When the jury convened, and before they were empannelled, the respondents objected, "that no jurors were taken from the town of West Cambridge, being the town in which the land of the petitioner is situate, and not being interested in the question: Also that the jurors were summoned by the officer to whom the warrant was directed, and not by a constable: Also that the jurors, in the cases of this petitioner and of George Pierce, were summoned under two warrants, both applications for a jury having been presented to the county commissioners, and passed upon, at the same time, for the assessment of damages occasioned by the laying out of the same rail road: Also that the officer, with the two warrants, made but one requisition upon each of the towns for jurors." These objections were overruled, by the officer appointed to preside at the trial, and the jury was empannelled.

During the trial, a witness for the petitioner was asked what was given, by the respondents, for land next adjoining the land of the petitioner. Another witness for the petitioner, a farmer who had occasionally bought and sold land, was asked what, in his judgment, was then the value of his own land next adjoining the land of the petitioner. Both of these questions were answered.

The jury were distinctly instructed by the presiding officer

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and the rule was repeatedly stated, in their hearing, that opinions, except of experts, were not evidence; but that the facts and reasons, on which any opinion or judgment was founded, were the evidence on which the opinion of the jury must be formed.

Exceptions were duly taken to the proceedings aforesaid, and were allowed by the presiding officer.

The verdict of the jury was returned into the court of common pleas, and was there ordered to be set aside. The petitioner appealed to this court.

Mellen & G. Farrar, for the respondents. 1. A part of the jurors should have been taken from West Cambridge. By the Rev. Sts. *c.* 24, § 19, the officer who receives a warrant for a jury to assess damages, caused by laying out a highway, is directed to "require of the selectmen of the three nearest towns, not interested in the question," to return jurors. And by Rev. Sts. *c.* 39, § 57, when application is made for a jury to assess damages caused by laying out a rail road, "the like proceedings shall be had thereon, as are provided in the twenty fourth chapter, for the recovery of damages for laying out highways." What is meant by "the three nearest towns not interested"?

In *St.* 1801, *c.* 16, § 2, which provides for the speedy removal of nuisances, the jurors who were to come before two justices of the peace, *quorum unus*, were directed to be drawn from the jury box of "the three towns next adjoining to the town in which such nuisance may be." So in *St.* 1814, *c.* 173, jurors for assessing damages caused by flowing land by mill dams were directed to be taken from "the three towns nearest to that in which the land injured is situated."

The change of language, in Rev. Sts. *c.* 24, § 19, above cited, is a change of the law. It was intended, by introducing language never before used on this subject, that jurors should be taken from the nearest point, if the town in which they live is not interested; both because they are better judges of the value of the land, and because less cost is thereby incurred. The words "towns not interested" mean not interested

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as a body corporate, in the question to be tried, and not the interest of an individual member of the town, who may bring a question before the jury. And the interest of the town must be a legal interest. In the case at bar, the town of West Cambridge had no corporate or legal interest in the amount of the petitioner's damages.

2. The two applications of the present petitioner and of Pierce should have been treated, throughout, either as joint or several. The Rev. Sts. *c.* 24, § 15, require that both should "be considered and determined by the same jury." But the officer treated the two cases, partly as joint, and partly as several. One requisition for jurors was made in two cases of owners of different lands, in which the two had no joint interest. As the cases now stand, there are two warrants and only one requisition; so that the record, in one or the other of them, must be incomplete. There should have been but one warrant, embracing both cases.

3. Notice to the jurors should have been served by a constable; the officer, to whom the warrant was directed, having no legal authority to summon them. Rev. Sts. *c.* 24, § 19; *c.* 95, §§ 15–17.

4. The price given by the respondents for land adjoining the petitioner's was not legal evidence for her. In the case of rail roads, there is not a free sale. The corporation offer more than the land is worth, in order to avoid adversary proceedings and the risk of the cost of a jury.

5. The farmer's judgment of the value of his own land, adjoining that of the petitioner, was not admissible in evidence; and the effect of his testimony was not prevented by the remarks of the presiding officer concerning that species of evidence. 1 Greenl. on Ev. § 440. *Needham* v. *Ide*, 5 Pick. 510. *Norman* v. *Wells*, 17 Wend. 136. *Gibson* v. *Williams*, 4 Wend. 320. *Dickinson* v. *Barber*, 9 Mass. 225. *Jameson* v. *Drinkald*, 12 Moore, 148.

Buttrick, for the petitioner. 1. The jurors were taken from the right towns. The town nearest to the land in the town is not the town in which the land lies; so that if the

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intention of Rev. Sts. c. 24, § 19, was, that jurors should be taken from the nearest point, as the respondents contend, the language is not conformed to that intention. The manifest purpose of the revised statutes was, to put the cases of flowing lands, and laying out highways, turnpikes and rail roads, on the same ground. And this purpose cannot be effected in all cases, except by excluding the town in which the land is situate. For, in some questions of *ways*, the town where the land lies is interested, and in others it is not. If the respondents' objection prevails, it follows that jurors from other towns must come from the towns whose boundaries are nearest to the land over which the rail road passes. The word "adjoining" is not used in the statute; because there may not be three adjoining towns not interested. Therefore the word "nearest" is used.

If West Cambridge could not be resorted to for jurors, in a highway case, then not in a rail road case; for Rev. Sts. c. 39, § 57, provide for "the like proceedings" in rail road cases, as in cases of highways. The revised statutes, throughout, recognize towns as parties to highway cases. In *Lanesborough* v. *County Commissioners of Berkshire*, 22 Pick. 278, the court held that a town, in which a highway had been laid out by the commissioners, was a party that might be aggrieved and appeal. Before the revised statutes, towns paid all damages in highway cases, and were therefore interested. Yet in flowing cases, and rail road cases, generally, towns are not interested. The object of the statute, in putting all these cases on the same ground, was, to exclude local interests and prejudices, and yet to take the jurors from the vicinage.

2. It is objected that a single requisition of jurors, for two separate cases, was made on two warrants. In the first place, the court cannot know, except from the venires issued by the officer, that two cases were pending. Is that judicial knowledge? But secondly, how is the provision of Rev. Sts. c. 24, § 15, that all applications, made to the county commissioners at the same time, shall "be considered and determined by the same jury," to be carried into effect? Can two cases be

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consolidated by the officer, *nolens volens?* We deny that this provision applies to rail roads. They go through many towns; so that the same jury cannot always decide two cases that may be brought at the same time. Two cases may be brought at the same time, from different towns, so that the jurors could not be brought from towns nearest to both.

3. The jurors were rightly summoned by the deputy sheriff to whom the warrants were directed. It is immaterial, however, whether they were rightly summoned, or summoned at all, as they were regularly drawn, attended, were empannelled, and performed their duty. *Patterson's case*, 6 Mass. 486. *Anon.* 1 Pick. 196. The Rev. Sts. *c.* 24, § 21, authorize the officer, who summons the jury, to return a talisman, when there is not a full jury, by reason of challenges or otherwise. By § 28, the same officer is required to give notice of the time and place of meeting to the presiding officer, &c.; and by § 29, his fees for summoning jurors are prescribed. These sections show that the officer, to whom the warrant is directed, (who never is a constable,) may summon jurors.

4. The evidence of the price paid by the respondents for contiguous land was properly received as proof of a fact. It was open to the respondents to show, and for the jury to consider, whether the price was an extorted or a fair one.

5. If the farmer's opinion of the value of his adjacent land was improperly admitted in evidence, yet the remarks of the presiding officer prevented its doing any harm. *Ellis* v. *Short*, 21 Pick. 142.

Dewey, J. It has become necessary, in the decision of this and other cases before us, arising upon proceedings in relation to claims for damages for injuries sustained by the location of rail roads, to decide as to the construction of the statute of the Commonwealth regulating the proceedings upon a petition for a jury to assess such damages. The right to a jury in such cases is given to either party who may be dissatisfied with the estimate made by the county commissioners, by the Rev. Sts. *c.* 39, § 57, wherein it is provided that, upon such petition being presented, "the like proceedings shall be had

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thereon as are provided in the twenty fourth chapter, for the recovery of damages for laying out highways." This provision is to be kept in mind throughout this whole inquiry.

The Rev. Sts. c. 24, regulate the proceedings in such cases, upon a petition for a jury to assess damages occasioned by the location of a highway. Section 18 requires that the warrant, in such cases, "shall be directed to the sheriff of the county, or his deputy who is disinterested, or to a coroner, requiring him to summon a jury of twelve men to hear and determine the matter of complaint." Section 19 enacts that "the officer who receives the warrant shall in writing require of the selectmen of the three nearest towns not interested in the question to return a number of jurors, not less than two nor more than six."

1. One point, arising upon § 19, is as to the true construction of the provision as to the towns from which the jurors are to be selected. Is the town, in which the land that is the subject of the claim for damages is situate, to be included as one of the three towns from which jurors are to be selected, or is it to be excluded? The language of the statute is not definite or precise upon that point. It is a case where we are called upon to give a construction to general language of the legislature, and, as far as possible, we are to give effect to the legislative will. The earliest statute on this subject, that of 1786, c. 67, § 4, was very general, giving the party a right to a hearing before a jury "to be summoned by the sheriff or his deputy;" making no provision as to the towns from which they should be selected. The next statute in the order of time (*St.* 1802, c. 135, § 1) provided that the jury in such cases should be drawn from "two or more disinterested towns in said county." This was followed by the *St.* 1827, c. 77, § 12, wherein it was provided that "such jury shall, in all cases, consist of twelve persons, and no more than three persons shall be taken from any one town," &c. To this have succeeded the Rev. Sts. c. 24, § 19, already cited.

The practical effect of the earlier statutes was, to exclude the town where the land, which was the subject of inquiry,

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was situate; as such town was, under the earlier course of legislation, interested in the result, whether it was a question of the location of a road, or the assessment of damages. Hence such town would necessarily be excluded. But under more recent statutes, the damages awarded to the owners of lands are chargeable solely upon the county, and in the mere matter of such damages the town may have no pecuniary interest. We believe, however, that the practice has always been to exclude the town, in which the land is situate, from the list of towns from which a jury is to be summoned to assess damages to the landholder.

By the provisions of the revised statutes, not only the proceedings on the subject of damages, by reason of the location of rail roads, is made to correspond with those of *c.* 24, in relation to highways, but similar provisions exist with regard to damages occasioned by the location of turnpike roads; Rev. Sts. *c.* 39, § 3; and also in relation to damages occasioned by the erection of mills. Rev. Sts. *c.* 116, § 13. As to the latter subject, the *St.* of 1814, *c.* 173, which was in force at the time of the enactment of the revised statutes, very clearly excluded the town in which the land was situate, in the selection of towns from which a jury was to be summoned. That provision required the jury to be taken from "the three towns nearest to that in which the land injured is situated."

We now find, as already stated, these various cases of claims for damages, all regulated by one provision, that of Rev. Sts. *c.* 24. Considering the practice so long prevailing, the provisions actually existing at the time of enacting the revised statutes, excluding, by direct words, the town in which the land was situated, in the case of water mills, and seeing no sufficient evidence of change of purpose, in this respect, in the revised statutes, and nothing in the language of the present existing laws, which requires a different construction, we are of opinion that "the three nearest towns" from which a jury is to be summoned, are the three towns nearest to that in which the land is situate, and exclusive of such town. A

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jury summoned in part from the town in which the land lies, that is the subject of damages, would therefore be irregularly summoned, and if seasonably objected to, their verdict would be set aside for that cause. [See *post.* 327, *note.*]

2. The next question arising is as to the mode of proceeding where two or more persons apply at the same time for several damages for injury occasioned by the same highway or rail road. Shall the warrant for a jury, in such cases, be several or joint? Upon this point, the statute seems to be entirely explicit. By Rev. Sts. c. 24, § 15, "if two or more persons shall apply at the same time for joint or several damages, they may join in the same petition to the commissioners; and if several applications shall be pending at the same time before the commissioners, for a jury to determine any matter relating to the laying out, alteration or discontinuance of a highway, or the assessment of damages, the said commissioners shall cause all such applications to be considered and determined by the same jury." The proper course is, therefore, for the officer to summon but one jury for the various cases. Such warrant to the sheriff from the county commissioners should, more properly, be a single warrant, reciting all the cases to be heard by the jury. Separate warrants, however, embracing various cases of claims for damage caused by the location of the same rail road, acted upon by the officer, as a joint warrant, in all the subsequent proceedings, and heard by the same jury, would not be so far objectionable as to require us to set aside a verdict for that cause.

3. Upon the question of summoning the jury, where the lands of several petitioners for a jury are situate in different towns, or where the lands of a single petitioner are situate in different towns, the court are of opinion that the rule must be that of a selection of jurors from three towns nearest the town in which the land of either of the petitioners is situate or, in case of a single petitioner, from three towns nearest to either of the towns in which his lands are situate, would be a sufficient compliance with the statute. This is all that is

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practicable; and the provision of § 15, above cited, requiring all petitions that are presented at the same time to be sent to the same jury, can only be carried into effect in this way.

4. As to the proper mode of giving notice to the jurors, after they have been drawn by the selectmen of the several towns, it has been contended that the only proper mode of notifying them is by a notice by a constable. This position is supposed to be warranted by the provisions of Rev. Sts. c. 24, § 19, requiring that "the jurors shall be drawn, summoned and returned as in other cases." Taking this provision alone, and referring to c. 95, §§ 15 – 17, regulating the summoning of jurors for the regular terms of the higher courts, it would seem to provide for a notification to the jurors by a constable. No such provision existed in the earlier statutes on this subject, and the practice under them is understood to have been different. Looking at various other sections of c. 24 of the Rev. Sts., they are found strongly to indicate a different mode of proceeding. By § 18, the warrant is to issue to the sheriff, "requiring him to summon a jury." By § 28, "the officer, by whom any such jury shall be summoned, shall give seasonable notice of the time and place of their meeting to the person appointed to preside at the trial, and also to the person appointed as agent for the county," &c. By § 29, "the officer shall receive, for summoning the jurors, four cents a mile for all necessary travel, and one dollar and fifty cents for each day that he shall attend upon them." The officer referred to in these sections is the sheriff or his deputy, and not a constable. See also § 21 In c. 95, on the other hand, the venires or requisition for jurors are to be served upon the selectmen by a constable, and all the proceedings are by a constable.

The court are of opinion that the law well authorizes the summoning of the jurors, in rail road cases, by the sheriff or his deputy; and that it is no objection to the regularity of the proceeding, that the jurors were not notified by a constable.

We do not mean to intimate that a notice to the jurors, by a constable, and an attendance by them in pursuance of such

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notice, all the proceedings being regular, would vitiate the verdict. However that may be, we are satisfied that a notification to the jurors, by the officer to whom the warrant is directed, is good and sufficient in law.

5. The further questions in this case arise upon the ruling of the presiding officer, upon the admission of evidence. In relation to the evidence which was admitted as to the price paid by the rail road corporation for the adjacent lot, we think it was competent. This was evidence of a fact, and not of an opinion. The price for which other adjacent lots had been actually sold was admissible, open of course to any evidence explanatory of the circumstances attending such sale, and tending to show why the purchasers gave a price greater than the true value of the land. If it had been a price fixed by a jury, or in any way compulsorily paid by the party, the evidence of such payment would be inadmissible before the jury. Upon the principle on which we should admit evidence of other sales between other parties of adjacent lots, this evidence was admissible, and none the less so because the rail road corporation were themselves the purchasers.

6. The next objection taken is that to the competency of an inquiry put to a witness, of the following purport: "A witness who was a farmer, and had occasionally bought and sold land, was asked what, in his judgment, was the then value of his own land next adjoining the land of the petitioner." This evidence does not come from an expert, or one properly entitled to give an opinion as an expert. Whether the presiding officer did or did not so consider him, is not quite clear. As to the competency of evidence of mere opinions, although the law of this Commonwealth is very liberal, more so than in some of our sister States, yet opinions are not deemed competent evidence, except when given by experts, unless upon some controlling ground of necessity, resulting from the nature of the inquiry. The evidence of opinion of the value of the property, that is the subject of the litigation, is of this character, and is admitted from the necessity of the case. Without it, you cannot, in many cases, bring before the jury such

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facts as will enable them to render a verdict for the proper damages for the value of the article which is the subject of damages. But such evidence of mere opinion as to the value of property is to be confined exclusively to the subject in reference to which damages are claimed. If you would aid the jury by reference to other articles, or property similarly situated, the evidence in reference to such other articles or other property must be that of facts, and not opinions. It is only by reference to facts that exist respecting the property, that a comparison is to be made that may aid the jury in estimating the value of the property in relation to which they are to assess damages. To allow any thing beyond this would be unnecessarily sanctioning the introduction of evidence of opinions of witnesses — evidence always somewhat objectionable in its character, and to be excluded as far as is practicable. We think it was not competent for the party claiming damages to introduce the speculative opinion of the witness as to the value of adjacent land, and especially his opinion of the value of his own land, and, by the effect of such testimony, form a standard of comparison by which the jury might estimate the value of the land which was the subject of controversy. This testimony, in the opinion of the court, ought to have been excluded.

It was suggested, upon the argument, that the subsequent instructions of the presiding officer, as to the evidence of opinions, obviated the objection to the admission of this evidence. We are apprehensive that those remarks were not intended by him as excluding the evidence now under consideration. The jury were not instructed that the evidence was inadvertently admitted, but was now held incompetent, and to be rejected by them. This testimony having been improperly admitted, the verdict must, for this cause, be set aside, and the case sent to a new jury.*

* In the case of James Brown *vs.* The Boston & Worcester Rail Road Corporation, argued and decided at this term, said Brown had obtained a verdict for damages caused by the construction of the respondents' rail road in such a manner as to injure his land situate in the town of Framingham. The

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Inhabitants of Marlborough *vs.* Inhabitants of Framingham.

S. bequeathed a fund to the town of F., the annual interest of which he directed to be applied for the support of his children, grandchildren or great grandchildren, if any of them should need support; otherwise, for the support of the poor of F.: N., a great grandchild of S., having a legal settlement in the town of M., was supported, as a pauper, by the town of W., and M. reimbursed W., and brought a bill in equity against the town of F. to obtain the sum thus expended for the support of N. *Held*, that the bill could not be maintained.

Bill in equity. The plaintiffs alleged, in the bill, that Micah Stone of Framingham made his last will on the 26th of August 1813, which was proved and allowed on the 13th of October following, and in which, after various devises and bequests, was the following clause: . "I give and bequeath to the town of Framingham all the remainder of my estate, of what name or nature soever, under the following regulations and restrictions; viz. the annual interest to be applied, under the direction of the selectmen of the said town for the time being, for the support of my children, grandchildren or great grandchildren, if any of them shall stand in need of support; otherwise, it may be applied to the support of the poor of said town; but no part of the principal shall ever be expended:" That the defendants and their selectmen accepted said bequest and trust: That, afterwards, Micah S. Newton, a great grandchild of said testator, had a legal settlement in the town of Marlborough, and was, from January 1st 1845 to January 1st 1847, poor, needy and in indigent circumstances, and stood in need of support; and that said town of Marlborough did, during all that time, furnish said Newton with necessary support, as they were bound by law to do, at an expense of $133·27; of all which, on the 18th of January 1847, said

court set aside the verdict because a part of the jurors were taken from that town; the respondents having objected to the competency of those jurors before the jury was empannelled.

S. Bemis, for the respondents.

Mellen, for the petitioner.

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town of Marlborough gave notice to said town of Framingham, and the selectmen thereof, and demanded payment, which was refused.

The prayer of the bill was for an answer from the defendants and their selectmen, and for such relief as the case requires.

The *answer* of the defendants admitted the main allegations in the bill, but alleged that Micah S. Newton, from January 1st 1845 to January 1st 1847, resided in the town of Westford, and was supplied by said town with support, during that time, at an expense of $133·27, which sum the plaintiffs paid to said town; and that no other sum had been paid by the plaintiffs, for that purpose: The overseers of the poor of said town of Westford gave notice to the plaintiffs, in the manner prescribed by law, that said Newton was receiving support as a pauper; so that the plaintiffs might have removed said Newton to the town of Marlborough, and have supported him at an expense less than that charged by the town of Westford. And the defendants averred that it was the duty of the plaintiffs to have given notice, forthwith, in the manner prescribed by law, to the selectmen of Framingham, that said Newton was chargeable, as a pauper, to the plaintiffs, so that said selectmen might have removed him to said Framingham, and have supported him at a less cost than is claimed in the plaintiffs' bill.

E. R. Hoar, for the plaintiffs. By the will, and the acceptance of the bequest and the trust, the bequeathed property is secured for the support of the testator's descendants, whenever they need it. This was settled in the case of *East Sudbury* v. *Belknap*, 1 Pick. 512. That case, in most particulars, is like the present. The town of East Sudbury supported a great grandchild of the testator, as a pauper, and after obtaining a judgment against the pauper, under the provisions of *St.* 1817, *c.* 186, which judgment remained unsatisfied, the town called on the selectmen of Framingham to pay the amount of the judgment, out of the fund bequeathed by the testator. And the court held them liable to pay it, on a bill filed

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The only question in the present case seems, therefore, to be, whether the pauper's being supported in Westford, and the plaintiffs' having reimbursed Westford, is different from incurring the expense in their own town. The plaintiffs deny that there is any legal difference. They have paid for the support of one of the testator's descendants, who was n need.

The defendants had no right to remove the pauper to their town. The power of removing a pauper is given by statute; but not in a case like this. The testator could not give the power of removal. And the will does not make it necessary that the defendants should remove him, and support him in their town, in order to render them liable for his support, under the will. In the case before cited, Parker, C. J. said, " we can have no doubt that, from the words of the will, the descendants of the testator, within the degrees limited by him, *wherever they may be*, would be entitled to aid from this fund." The will does not require residence in Framingham, in orde: that the pauper should be relieved by the fund devised.

Train, for the defendants. The plaintiffs were bound to remove the pauper to their town, from Westford. If they had done so in thirty days after notice, they would have been bound to pay only a dollar per week, and thus have saved the defendants a considerable sum. Rev. Sts. *c.* 46, § 15.

But if the defendants were not bound to remove the pauper, yet they were bound to assume the charge of him, so that no unnecessary expense might be incurred for his support. Especially were they bound so to do, in order to call on the defendants for reimbursement.

In the case of *East Sudbury* v. *Belknap*, which is relied on by the plaintiffs, notice was given to the present defendants. If it had not been so, the case would have been differently decided.

If the defendants have no power of removing the pauper to their town — as they probably have not — yet the plaintiffs cannot make themselves creditors of the defendants,

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without notice, before the expense is all incurred, that the pauper is receiving support.

Dewey, J. The questions of a trust arising under the will of Micah Stone, the persons for whose benefit that trust was created, and who were the trustees under that will, were all fully considered and settled by this court, in the case of *Inhabitants of East Sudbury* v. *Belknap*, 1 Pick. 512. To this extent the cases are alike. But upon the further question, whether the plaintiffs have such an interest in the fund as will entitle them to a decree in their favor, the cases are not analogous. In the case of *East Sudbury* v. *Belknap*, the plaintiffs had obtained judgment against the great grandchild, the pauper, for the amount of supplies that had been furnished him, they having sued the pauper, by virtue of *St.* 1817, *c.* 186, § 5, which authorized such action. This judgment being unsatisfied, it was held by the court, that upon the principles and practice prevailing in courts of chancery, it was competent for a creditor, having an unsatisfied judgment, and thereby interested in any fund of his debtor, which was placed in trust, to file a creditor's bill, and thus enforce his claim against such trust fund. This court, although with some apparent hesitancy, sustained the bill, in the case referred to, under that principle of equity proceedings. It is, I believe, the only reported case in our own reports, where a similar application for relief, by a sole creditor, as an unsatisfied judgment creditor, has been the subject of consideration by this court, although the principle is a familiar one in chancery courts. But it is required, as preliminary to the filing of such a bill, that judgment shall have been obtained against the debtor. No such judgment has been obtained in the present case, and no proper case, therefore, presents itself for the application of the principle upon which the bill was sustained in the case of *East Sudbury* v. *Belknap*. Indeed, we do not know of any provision of law by which such a judgment can now be obtained; the *St.* of 1817, *c.* 186, having been repealed by the general repealing act of 1836, Rev. Sts. page 824, and no similar provisions reënacted. See *Inhabitants*

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of Deer Isle v. *Eaton*, 12 Mass. 328. *Selectmen of Benning ton* v. *McGennes*, N. Chip. 45, and 1 D. Chip. 44.

The result is, therefore, that this bill must be dismissed.

REBECCA FELLOWS *vs.* JAMES DUNCAN & Trustees.

An order of a city council, upon laying out a street, that a certain sum be paid, as damages, to a party over whose land the street was laid out, does not constitute a debt due from the city, and therefore does not make the city liable as trustees of such party, under the Rev. Sts. c. 109, which regulate the trustee process.

THIS was an action of debt on a judgment recovered against the principal defendant; and the city of Lowell were summoned as his trustees. The city treasurer put in the following answer, on oath:

"The city of Lowell, at the time of the service of the writ upon them, had no property of the principal defendant intrusted or deposited with them, and were not indebted to him, except as follows: The city council, on the third day of August last, by virtue of their powers under the act incorporating said city, and in pursuance of their own by-laws, laid out a certain street or town way, called Locke Street, and, in so doing, did appropriate to the public use a certain lot of land, or part thereof, across which said street was laid out, and which was supposed to belong to the principal defendant. And the council, on the same day, did award and order, that the sum of three hundred and twenty dollars and thirty one cents should be paid to him for land taken for said street: That since the laying out of said street and said award for land taken, it has been ascertained that said lot of land was held by Elizabeth Cummings, in the year 1838, and said Elizabeth, since that time, married the principal defendant, and is now his wife, and said principal defendant has no title or interest in said lot, except in the right of his wife: That said award of damages (as the respondent is informed and believes) was made under a mistake of fact, and under the

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belief that said principal defendant was the owner in fee simple of said lot of land, and that said Elizabeth claims that the amount of said award is payable to herself, and is not liable to be attached or holden upon this process."

The court of common pleas charged the trustees on their answer, and they appealed to this court.

S. Ames, for the trustees. 1. Damages assessed for roads are not within the provisions of the Rev. Sts. *c.* 109, which regulate the trustee process. Such damages are not "credits," within the meaning of § 4. Credit is correlative to debt, and a debt arises only upon some contract, express or implied. The words, "goods, effects or credits intrusted to or deposited," are descriptive of a contract, and of nothing else. *Rundlet* v. *Jordan*, 3 Greenl. 47. *Maine Fire & Marine Ins. Co.* v. *Weeks*, 7 Mass. 438. *Lupton* v. *Cutter*, 8 Pick. 298. *Picquet* v. *Swan*, 4 Mason, 443. An action would not lie against the city to recover the damages awarded for taking the land in question for a public street. *Gedney* v. *Inhabitants of Tewksbury*, 3 Mass. 307. *Harrington* v. *County Commissioners of Berkshire*, 22 Pick. 263.

2. The debt, if it be a debt, was contingent; that is, the process was served while the parties had a right of appeal. It was not *debitum in præsenti*. If damages had been obtained from a jury, the debt would have been by verdict and record, and not subject to the trustee process.

3. The award, so called, was only an offer; and until it was accepted, the sum was not due. Besides, it was made on a mistake of fact, as to the owner of the land; and it should be altered, in order to do justice.

J. G. Abbott, for the plaintiff. 1. These damages belong to the defendant; and where there is a right, the law will provide a remedy, viz. by action, if payment is refused. If so, then the trustee process applies. The Rev. Sts. *c.* 24, § 68, provide that damages sustained by the laying out of any town way, "shall be paid by the town;" but no form of recovery is prescribed. An action of debt may therefore be maintained. In *Gedney* v. *Inhabitants of Tewksbury*, 3 Mass

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307, the statute then in force (*St.* 1786, *c.* 67, § 6) prescribed a warrant of distress; and for that reason it was held that debt would not lie.

2. Judgment was not rendered against the trustees, by the court below, until after the right of appeal from the award of the city council was gone by lapse of time. But if an appeal had been taken, a jury would not have had a right to assess less than the city council had awarded. No authority is given to a jury by the Rev. Sts. *c.* 24, to reduce the damages awarded by town or city officers. The plaintiff is therefore entitled to recover of the trustees the amount awarded by the city council.

3. There is no sufficient evidence that there has been a mistake as to the defendant's owning the land. The city treasurer, who has made the answer, cannot know the reasons of the vote of the city council. See Rev. Sts. *c.* 24, §§ 11, 12.

Ames, in reply. The jurors' oath, prescribed by Rev. Sts. *c.* 24, § 22, is, that they will "make a just and true appraisement of the damages sustained by the complainant." This shows that they can reduce as well as increase damages.

The case of *Harrington* v. *County Commissioners of Berkshire*, 22 Pick. 263, shows that, since the revised statutes, no action lies for damages in a case like this.

Shaw, C. J. The court are of opinion that the city of Lowell are not liable upon their answer as trustees. The city council had adopted a resolution, laying out a public way, and embracing, among other things, a resolution that a certain sum should be awarded and paid to Duncan for land taken. But no order had been delivered to the treasurer to pay the money. It was not a debt due, on which an action of debt would lie against the city. Something further remained to be done. Should the party, to whom damages are awarded, be required to apply for a *mandamus*, or other process, requiring the proper officers of the city to draw an order or take any other step for the payment of his damages, it would be open for them to show that the money was not due to Duncan, but to

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other parties. This is the more important, since they say, in their answer, that they have now discovered that the whole of the money is not payable to Duncan. But the ground of discharge is, that at the time of the service of the writ there was no debt due from the city to Duncan, the principal defendant. *Trustees discharged.*

Proprietors of the Canal Bridge *vs.* Trustees of the Methodist Religious Society in Cambridge.
The Same *vs.* Trustees of the Wesleyan Academy.

The proprietors of Canal Bridge granted to B. and others, by deed, a lot of land, in fee, to be held in trust for S. and others, and their associates, "for the purpose of the public worship of God, and the erection, on said premies granted, of a church or meeting-house for said worship, as also a house for a clergyman, and a school house:" The following conditions were inserted in the deed: "And this grant hereby made is upon the express condition that the grantees, or *cestuis que trust*, or some of them, shall build and finish, within two years from the 9th day of November 1822, on the lot hereby conveyed, a church or meeting-house for the public worship of God, and shall build and finish, within three years from the said ninth day of November, a suitable dwelling-house for the clergyman, and a school house, all on the lot hereby conveyed; and in case the said church or meeting-house, and parsonage house and school house, shall not be built on said lot, and finished within the respective times above mentioned, then the land hereby granted, with its appurtenances, is to revert to said Proprietors of Canal Bridge: And this grant is upon this further condition, that the land hereby conveyed shall be forever hereafter appropriated to the maintenance and support of the public worship of God, as hereinbefore specified, and to no other uses or purposes whatever; otherwise, the same to revert to said corporation of the Canal Bridge, as above mentioned:" Afterwards, the grantors extended the time within which the school house might be built: B. and others conveyed said lot to S. and others, in trust for a religious society that had been incorporated, to be held on the same trusts and conditions that were expressed in the deed of the original grantors, made to B. and others: The meeting-house, parsonage house and school house were built on said lot, and were finished, to the satisfaction of the original grantors, within the times mentioned in their deed, and afterwards extended by them: Afterwards, another house, connected with the school house, was built on said lot, for the use of the preceptor of the school; a vestry and two shops were made in the basement of the meeting-house, and the shops leased for secular business; the land on which the parsonage house was built was mortgaged for a debt incurred in building on the whole lot; the land on which the school house and preceptor's house were built was leased for a long term to an incorporated academy, and said academy mortgaged the same: The original grantors entered upon the land originally granted by them to B. and others, for breaches of the conditions in their deed of conveyance, and brought writs of entry to recover the whole land as forfeited

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by such breaches. *Held*, that the second condition in said original deed was repugnant to the previous parts of the deed, and was void; and that the actions could not be maintained.

These were writs of entry, brought in May 1844. In the first, the demandants sought to recover a piece of land in East Cambridge, containing 8420 square feet; and in the second an adjoining piece of land, (with the buildings and appurtenances,) containing 11,580 square feet; both forming a part of lot No. 118 on a plan of lands at East Cambridge, made by Stephen P. Fuller, and recorded in the registry of deeds in Middlesex county, Book 243, folio 544.

At the return term, the demandants, by order of the court, filed a specification of the grounds of their claim, in both actions, in the words following: "The demandants in these suits seek to recover the demanded premises, on the ground of an alleged breach of the conditions in the deed (dated January 14th 1823) by which the demandants conveyed the premises to Amos Binney and others; said deed being recorded in Book 246, page 184. Breaches relied on by the demandants are the following: 1. That the parsonage house, school house and meeting-house, mentioned in said deed, were not erected and finished within the time limited by the deed. 2. That the parsonage house was not erected on the land granted by the demandants, as required by the deed. 3. That there has been erected, on the demanded premises, a dwelling-house, other than the parsonage, and not authorized by, but in breach of, the condition of said deed. 4. That the basement story under said meeting-house has been appropriated, by the tenants, for a tailor's shop, provision store, &c. 5. That the tenants, on or about January 1st 1828, leased to the Trustees of the Wesleyan Academy a part of the lands conveyed by the demandants, by their deed aforesaid, (the part on which the school house and a dwelling-house stand,) for the term of 999 years, at a nominal rent, and have ever since the date of said lease, permitted said lessees to have possession of, and to appropriate, the demised premises and the rents and income thereof to uses and purposes other than the

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support of the public worship of God, as specified in said deed. 6. That the tenants have heretofore conveyed a part of said premises, with the parsonage house thereon, in fee and in mortgage, to Amos Binney, now of Boston, to secure the payment of $1200. 7. That said lessees have heretofore conveyed that part of the premies, leased to them in fee and in mortgage, to John Emory, Esq. of New York, to secure the payment of $2500."

By a like order of the court, the tenants, in both actions, filed specifications of the grounds of their defence. The specification of the Trustees of the Methodist Religious Society, tenants in the first action, was as follows: "The tenants in this action will require the demandants to make out their title fully and affirmatively, and will set up in defence all such matters and things as, at common law or by statute, may be given in evidence under the general issue, and will rely, in particular, upon the following matters of defence: 1. That there has been a complete and full performance of all the conditions of the grant to Amos Binney and others, by the demandants. 2. That there have been no acts done, amounting to a breach or violation of any condition of the said grant, as alleged by the demandants. 3. That the time for the performance of the conditions of the said grant, as by the terms thereof limited, was extended by the demandants, and the said conditions performed, either within said time or the time originally limited. 4. That the demandants have accepted the acts and doings of the grantees, and those claiming under them, as a full and satisfactory performance of the conditions of said grant, and have exonerated and discharged them therefrom, and from any further performance thereof. 5. That the conditions, in said deed limited, were not the conditions of the grant, as declared and limited by the votes of the demandants, (granting the demanded premises, as prayed for by the petition of Atherton H. Stevens and others,) and upon which said grant was made, and which were directed by the demandants to be limited in the deed thereof; but that the same were inserted in said deed without the knowledge or authority, and

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contrary to the direction, of the demandants, and do not in fact constitute the conditions on which the demanded premises are held or were granted. 6. That the several acts and things alleged by the demandants to have been done, and to be breaches of the said grant, have not been in fact done, or, if done, do not constitute any such breach or breaches as will work a forfeiture of the demanded premises. 7. That neither the demanded premises, nor any part thereof, nor the rents and income thereof, have been appropriated to uses and purposes other than those limited by the terms of said grant, and contemplated by the demandants. 8. That the lease and mortgages, alleged by the demandants to have been made, and the alleged appropriation of the basement story of the meeting-house to a tailor's shop, provision store, &c. if in fact made and done, were made and done in performance of, and to obtain the means to perform, the conditions of the said grant. 9. That the parsonage house was in fact erected on the premises granted by the demandants, or, if not wholly, so far, at least, as to be a substantial performance of the conditions of the said grant; or, if not, the same has been accepted as a performance, and all objection thereto waived and relinquished by the demandants. 10. That the last condition in said deed is repugnant to the said grant, and to the conditions in said deed previously limited, and to the uses and purposes therein declared."

The specification of the Trustees of the Wesleyan Academy, tenants in the second action, was thus: "The said trustees will insist that this action cannot be maintained against them, because they claim, and ever have claimed, to have nothing in the demanded premises, but only a term for years, by virtue of indentures of lease, dated January 1st 1828, whereby the Trustees of the Methodist Religious Society in Cambridge, then and now tenants of the freehold, conveyed the premises therein described to the said supposed tenants for a term of 999 years, which indentures were made for a full and adequate consideration, paid to said trustees of said religious society, or those under whom they

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claim, and which was by them applied to the performance of the conditions of the grant of the demanded premises to Amos Binney and others by the demandants, and to the uses and purposes thereof; the fee and freehold then, ever since, and now, remaining and being in the said Trustees of the Methodist Religious Society in Cambridge. And for a further specification of defence, the said supposed tenants adopt that filed in the case of the Proprietors of the Canal Bridge against the Trustees of the said Methodist Religious Society."

The tenants, in both actions, closed their specifications with a notice that if judgment should be against them, they should claim compensation for all buildings and improvements made or erected by them, or any under whom they claimed, upon the demanded premises, and to have the same ascertained and assessed by the jury, according to the provisions of *St.* 1807, *c.* 75, and the Rev. Sts. *c.* 101.

The trial was before *Hubbard*, J. who made a report thereof as follows: The demandants gave in evidence the following deeds: 1st. Their deed of January 14th 1843, for the alleged consideration of five dollars to Amos Binney and others, mentioned in the specifications of the parties. The *habendum* of this deed was as follows: "To have and to hold the above granted premises to the said Binney, [and four others named,] their heirs and assigns, to the several uses, and upon the several trusts, and subject to the several conditions, declarations and agreements hereinafter mentioned: To wit, in trust for Atherton H. Stevens, [and twenty eight others named,] their heirs and assigns, together with such other persons as may associate with them, for the purpose of the public worship of God, and the erection, on said premises granted, of a church or meeting-house for said worship; as also a house for a clergyman, and a school house. And this grant hereby made is upon the express condition that the grantees or *cestuis que trust*, or some of them, shall build and finish, within two years from the ninth day of November last," (1822,) "on the lot hereby conveyed, a church or meeting-house for the public worship of God, and shall also build

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and finish, within three years from the said ninth day of November, a suitable dwelling-house for the clergyman, and a school house, all on the lot hereby conveyed. And in case the said church or meeting-house, and parsonage house and school house, shall not be built on said lot, and finished within the respective periods above mentioned, then the land hereby granted, with its appurtenances, is to revert to said Proprietors of the Canal Bridge. And this grant is upon this further condition, that the land hereby conveyed shall be forever hereafter appropriated to the maintenance and support of the public worship of God, as herein before specified, and to no other uses or purposes whatever; otherwise, the same to revert to said corporation of the Canal Bridge, as above mentioned." The boundaries of the land conveyed by this deed are stated in the opinion of the court.

2d. A deed of the same premises, from Amos Binney and others, grantees in the deed last mentioned, to the Trustees of the Methodist Religious Society in Cambridge, dated July 1st 1824, conveying said premises to them, to have and to hold the same, to the same uses, and upon the same trusts and conditions, that were expressed in the deed of January 14th 1823 from the demandants to said Binney and others, except that the church or meeting-house, to be erected on the premises, was to be "for the worship of God according to the discipline of the Methodist Episcopal Church in the United States."

3d. A mortgage deed, made to Amos Binney by the Trustees of the Methodist Religious Society aforesaid, dated October 1st 1845, conveying a part of the land described in the two last mentioned deeds, viz. the land on which the parsonage house was built, to secure the payment of $1219·21, in five years, with interest payable semiannually.

4th. An indenture of lease for the term of 999 years, from said Trustees of the Methodist Religious Society in Cambridge to the Trustees of the Wesleyan Academy, of the premises demanded in the second of these actions. This lease reserved one dollar per annum, as rent, and was "upon

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the express condition, that no building" should "be erected on any part of said land, nor any business, trade or occupation transacted or carried on thereupon, or in any building thereupon, which" should "in any wise interfere with or interrupt the peaceable and quiet enjoyment of the said church and parsonage house" contiguous to the demised premises, "or be in any wise a nuisance to them who" should "lawfully occupy and use the same," &c.

5th. A mortgage deed, from said Trustees of the Wesleyan Academy, of the premises described in the indenture of lease to them, above mentioned, to John Emory, acknowledged on the 14th of November 1830, to secure payment of $2500 in four years, with semiannual interest, payable in New York.

The demandants abandoned any claim under the first and second breaches of condition alleged in their specification, and proceeded to give evidence of the following facts; some of which were not denied by the tenants: 1. That a brick dwelling-house, two stories high, was erected and finished before November 1st 1826, by the tenants in the first of these actions, on that part of the premises conveyed by the demandants to Amos Binney and others by the deed of January 14th 1823, and which was afterwards leased to the Trustees of the Wesleyan Academy, as above stated: That the house was built at the same time and in connexion with the school house, and forms a part of 'the school house block,' so called. 2. That the Trustees of the Wesleyan Academy have, ever since the date of the lease aforesaid to them, had possession of the premises described in said lease and in the demandants' writ against them, and have received the rents and income thereof, and appropriated the same to the uses and purposes of the academy at Wilbraham: That the school house has always been, and now is, kept up and maintained by said lessees, and rented by them at a low rent, sometimes for a high school, and sometimes for a private and primary school. 3. That the basement under the meeting-house was rented by the tenants in the first of these actions, for the storage of glass and other merchandize, from 1824 to 1842:

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That during that period, the embankment, on the north side of the meeting-house, came above and covered the rough stone foundation of said house, and sloped off gradually towards the sidewalk in Cambridge Street: That, in 1842, this embankment was removed, to the depth of about four feet, leaving said foundation, towards said street, uncovered; and windows and doors were inserted in the basement wall, and the basement was partitioned off into three apartments. which were finished; one for a vestry, one for a tailor's shop and one for a provision store: That the vestry has been ever since occupied, as such, by the said Methodist church and society, and the store and shop have been rented by the trustees of said society, and the rents thereof, and of the basement while rented for the storage of glass, &c. have been applied to the payment of the debts of the society, incurred in erecting the buildings, for repairs and for preaching, and to the support of public worship: That on the 25th of April 1844, the demandants made an actual entry on each of the parcels of land demanded in said actions, for breach of the conditions of their said deed of January 14th 1823, and for the purpose of obtaining seizin and possession thereof, upon the ground of an alleged forfeiture.

The tenants then gave in evidence the following acts of the legislature: *St.* 1809, *c.* 85, incorporating a company by the name of the Lechmere Point Corporation, and *St.* 1822, *c.* 19, in addition thereto; *St.* 1823, *c.* 46, incorporating the Trustees of the Methodist Religious Society in Cambridge, and *St.* 1823, *c.* 81, incorporating the Trustees of the Wesleyan Academy: Also the records of said Lechmere Point Corporation, of September 21st and October 31st 1822. From these records it appeared that at a meeting of the directors of said company, on the 21st of September 1822, it was voted "that Messrs. Binney, Rogers and Terry be a committee to consult and report upon the petition of sundry persons for a lot of land for a meeting-house;" and that, on the 31st of October following, at a meeting of said directors, it was voted, "that the petition of sundry persons for land for a

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meeting-house be referred to the Proprietors of the Canal Bridge."

The tenants then put into the case a deed of the demanded premises, made by the Lechmere Point Corporation to the demandants, (who were incorporated by *Sts.* 1806, *c.* 88, and 1807, *c.* 61,) dated October 21st 1822: Also the following extracts from the records of the demandants, to wit, *first*, a report read and accepted at a proprietors' meeting held on the 9th of November 1822, in these words: "The committee, to whom was referred the petition of Atherton H. Stevens and others, asking a donation of a lot of land for the erection of a house for public worship and other purposes, have seen the petitioners, and, from a communication with them, learn that they wish to erect a house for the minister and a school Impressed with the utility of such institutions, and considering that the property generally will be enhanced in value, the committee report, that in their opinion it is expedient to grant them a lot of land, one hundred feet square, on the corner of Cambridge and South Third Streets, provided a church shall be erected and finished in the course of two years. And one other lot of one hundred feet square, on the corner of Otis and South Third Streets, provided that a suitable dwelling-house for the clergyman and a school house shall be erected and finished within three years from the present period. That the land shall be conveyed to trustees appointed by the petitioners, and approved by the directors; and in case of non-compliance with the conditions above named, said lots to revert to Canal Bridge." *Second*, a record of the proceedings at a directors' meeting, held on the 10th of January 1823, when the trustees, chosen by the petitioners for a lot of land, to receive a conveyance thereof, were approved, and an order passed, that a deed should be made to said trustees, (Amos Binney and others,) and that a stockholders' meeting should be called on the 14th of January 1823, to enable the president to sign said deed. *Third*, a vote, at a proprietors' meeting held on said 14th of January, "that the president be authorized to sign the deed to the trustees mentioned in the vote of

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the directors, of January 10th instant, of a certain lot of land at Lechmere Point, for the purpose of building a meeting-house, according to a vote of the proprietors, of November 9th 1822, and the report of the committee and the vote thereon." *Fourth*, the following vote passed at a proprietors' meeting held on the 25th of April 1826: "On the representation of the directors, that they had granted to Colonel Binney an extension of time, for the purpose of erecting a school house on the lot granted to the Trustees of the Methodist Society at Lechmere Point, for the erection of a meeting-house and school house, as appears by vote of proprietors January 14th 1823; the meeting-house and dwelling-house being completed: It was voted, that the extension granted by the directors be confirmed, and that the time for the completion of said school house be extended to the first of November next; the said school house to be built of brick." *Fifth*, the appointment of a committee, by the directors, on the 24th of October 1826, to ascertain whether the conditions of the deed of January 14th 1823 had been complied with; and a report of said committee (William Payne and Ebenezer Francis) in these words: "Boston, November 16th 1826. The undersigned, a committee appointed by the directors of Canal Bridge, on the 24th ult., have examined the buildings erected on land granted to Amos Binney and others, trustees, and report: That a meeting-house, parsonage house and school house have been erected on said land, in conformity to the conditions made in said grants; and that the same have been built with brick, in a substantial manner."

The tenants also gave in evidence the records of the Trustees of the Methodist Religious Society in Cambridge, accepting their act of incorporation on the 21st of July 1823; passing by-laws on the 28th of July 1823; accepting, on the 9th of August 1823, the proposal of Amos Binney to build a meeting-house, and choosing a committee to obtain a plan, in conjunction with Binney, and adopt measures for finishing the house; authorizing Binney, on the 27th of May 1824, to lease the cellar under the meeting-house; voting, on the 2d of June

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1826, to mortgage the land, granted to Amos Binney and others, to said Binney, or to any person or persons who would advance the funds necessary to erect the buildings required by said grant of the land, and to give a lease of said buildings, as payment of the interest of the money thus advanced; and also (among other proceedings and votes) a vote, passed on the 28th of August 1834, authorizing the secretary and treasurer to execute a mortgage deed of the parsonage house and lot to the representatives of the estate of Amos Binney (deceased) for the payment of the amount due to said estate.

The tenants also gave in evidence a discharge of the mortgage made, as above mentioned, to John Emory.

To the admission of all the foregoing documentary evidence the demandants objected; and the tenants thereupon offered to prove all the facts therein set forth and contained, by the testimony of witnesses. Whereupon the demandants admitted the truth of said facts, but denied that said facts were admissible or competent to be proved in this case. And it was thereupon agreed, that all the facts contained in said documentary evidence, so far as legally admissible and competent, and no further, should be taken to be proved in this case.

It further appeared, on the part of the tenants, that a brick meeting-house was erected on the lands granted to Amos Binney and others by the demandants, as above stated, in the spring of 1824, and was dedicated on the 21st of July 1824, and has ever since been used, as a meeting-house, by the Methodist Society in Cambridge; that constant religious worship has been maintained therein; and that said house was constructed over a large cellar or basement, which has been occupied, as before stated.

It also appeared, that the parsonage house, mentioned in the aforesaid deed to Amos Binney and others, was erected on part of the demanded premises, prior to April 25th 1825, and has ever since been appropriated by the tenants in the first of these actions for the use of their minister.

It further appeared, that the money, to pay for the erection

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of the several buildings aforesaid, was advanced to the Trustees of the said Methodist Religious Society, by Amos Binney, and that he was settled with by said society, in the manner stated in said society's records: That no buildings, besides those above mentioned, have been placed on the demanded premises, and that all the buildings now remain on the land, precisely as they were originally made, and as they were on the 16th of November 1826, when visited by the committee of the demandants; except that the cellar or basement of the meeting-house has been finished off into a vestry, &c. as above stated.

It was agreed by the parties, at the trial, that the claims of the respective tenants for compensation for buildings and improvements should be postponed, without prejudice to either party, until the court should determine the question of law arising on this report of the facts.

The cases were taken from the jury, under an agreement that judgment should be rendered upon nonsuit or default, or that the cases should be put to a jury, as the whole court should direct.

These cases were argued at the last October term.

Buttrick, for the demandants. The second condition in the deed to Binney and others, that the land should be forever appropriated to the maintenance and support of public worship, and to no other uses or purposes, has been violated by the tenants. If so, then a writ of entry is the proper action to be brought by the grantors. *Hayden* v. *Inhabitants of Stoughton*, 5 Pick. 528. The tenants will insist, however, that the condition has been waived by the demandants. But mere indulgence does not destroy the effect of a condition. See *Gray* v. *Blanchard*, 8 Pick. 284. *Jackson* v. *Crysler*, 1 Johns. Cas. 125. *Picket* v. *Dowdall*, 2 Wash. 106.

The lease to the trustees of the Wesleyan Academy was one breach of the condition of the deed. That lease was in effect an alienation of the land in fee, for a nominal sum, besides being a diversion of the property from the uses for which it was granted. See Rev. Sts. *c.* 97, § 33. *Attorney*

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General v. *South Sea Co.* 4 Beavan, 453. *Attorney General* v. *Brettingham*, 3 Beavan, 91. *Attorney General* v. *Green*, 5 Ves. 452.

The vote of the demandants to give the deed cannot affect the construction of the deed that was given. The deed must be its own interpreter. 1 Greenl. on Ev. §§ 275–281. *Child* v. *Wells*, 13 Pick. 121.

The last condition in the deed is not void, as creating a perpetuity. *Scatterwood* v. *Edge*, 1 Salk. 229, and 12 Mod. 278, 287. 2 Bl. Com. 174. It is unimportant who is the owner of the fee. Binney has already conveyed the land to the Methodist Religious Society; and it is the appropriation only that is restricted by the deed. See *Second Congregational Society in North Bridgewater* v. *Waring*, 24 Pick. 304. But if it be a perpetuity, it is not contrary to the policy of the law. *Bartlet* v. *King*, 12 Mass. 537, 540. *Gass* v. *Wilhite*, 2 Dana, 170. *Griffin* v. *Graham*, 1 Hawks, 96. *Inglis* v. *Trustees of Sailors' Snug Harbor*, 3 Pet. 99. *Going* v. *Emery*, 16 Pick. 107. *M'Cartee* v. *Orphan Asylum Society*, 9 Cow. 437. *Austin* v. *Cambridgeport Parish*, 21 Pick. 215. This condition would not be void in England on the ground of its being a perpetuity. *Porter's case*, 2 Co 22–26. *Magdalen College case*, 11 Co. 71. Shep Touch. 130. Dr. & Stud. (16th ed.) 212.

Fletcher & A. B. Merrill, for the tenants. The conditions in the deed are different from the vote under which the deed was ordered to be made; and if the vote cannot vary or explain those conditions, yet if the terms of those conditions are ambiguous or contradictory, the court will expound them most beneficially for the grantees, and most strongly against the grantors. Plowd. 156, 171, 287. 24 Amer. Jurist, 11. *Adams* v. *Frothingham*, 3 Mass. 361. And this rule is specially applicable to conditions that go to defeat an estate. 2 Crabb on Real Property, § 2153. The understanding of the grantors, as manifested by contemporaneous and long continued acts and omissions, is also rightly resorted to in the interpretation of deeds. *Jackson* v. *Gardner*, 8 Johns.

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406. *Stone* v. *Clark*, 1 Met. 378. *Crafts* v. *Hibbard*, 4 Met. 452. 1 Greenl. on Ev. §§ 286 – 288.

The second condition in the deed is void. *First*, because it is repugnant to the grant, and to the incidents of the estate granted. Co. Lit. 206 *b*. Com. Dig. Condition, D. 4. *Moore* v. *Savil*, 2 Leon. 132. It is manifestly repugnant to the grant, unless it be construed to refer only to the land granted for a meeting-house. But such are not its terms. *Secondly*, because it attempts to create a perpetuity against the rules of law. Lewis on the Law of Perpetuity, (Amer. ed.) 49, 138, 139, 386, 396, 397. 1 Jarman on Wills, 219, 220.

The tenants have performed the first condition in the deed, in every particular; or, if they have not, the demandants have accepted the performance so far as it has been made, and have waived any further or different performance. *Jackson* v. *Crysler*, 1 Johns. Cas. 125. This acceptance shows how the demandants construed their own grant; and this, as already shown by authorities, is a proper source of interpretation.

The building of the house, which was not required to be built, was connected with the school house, for the preceptor, and is in furtherance of the interests of the school, which was one of the purposes of the grantors, as clearly as the support of public worship. See *Jackson* v. *Pike*, 9 Cow. 69.

The lease to the Trustees of the Wesleyan Academy is no ground of forfeiture. Owners of the fee may make leases for as long terms as they please. This is an incident to a fee simple estate. The land leased was not that on which the meeting-house was erected; and the rents have not been misapplied. The owner of a fee may also very clearly make mortgages of his estate. After the tenants had performed the conditions of their grant, there was no restriction on alienation by them. *Simonds* v. *Simonds*, 3 Met. 558.

Shaw, C. J. Several questions have been raised and elaborately discussed in the present cases, upon which the court have found no occasion to express any opinion; the decision of the cases being, in our opinion, to be determined by

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the construction of the deed given to Amos Binney and others by the demandants. Being a claim for a forfeiture, for an alleged breach of a condition subsequent, the words of the deed are to be taken most strongly against the grantors and in favor of the grantees.

It is a grave question whether, if the deed were clear and explicit on the face of it, and capable of but one construction, other contemporaneous written evidence, such as the votes, accepted reports, and other records of the demandants, showing the purpose they had in view in making the deed, the terms on which it was intended to be made, and the authority conferred on their agents, would have been admissible, to control such construction, and give a different effect to their deed. The court have not thought it necessary to put the decision on that ground, or to decide whether they are admissible for that purpose, although their votes may be referred to in another aspect, to show what construction the grantors put on their own deed.

The purpose of giving the deed is manifest from the deed itself, and the relations and circumstances under which it was made. The grantors had become a company, holding a quantity of land for sale, in house lots, the same having been recently transferred to them, as such land company, by the Lechmere Point Company. It would be manifestly for the interest of such a company, and tend to promote a sale of their lots, for purposes of habitation, that a provision for public worship, and schools for the education of children, should be permanently established; just as it was for their interest to appropriate land gratuitously for streets. The consideration was a nominal one, and the grant was made to five persons, in trust for themselves and for thirty or forty others named. The deed was in the common form of a deed by a corporation, under its common seal and the hand of their president, and purported to be a grant of a lot of 20,000 feet, described, bounded on three sides by streets, and on the fourth by their own land. It embraced two corner lots of 10,000 feet each. It was made to the five persons named, their heirs and assigns.

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habendum to the several uses, and upon the several trusts, and subject to the several conditions, declarations and agreements thereinafter mentioned; to wit, in trust for Atherton H. Stevens, and twenty eight others named, their heirs and assigns, together with such other persons as might associate with them for the purpose of the public worship of God, and the erection, on said premises granted, of a church or meeting-house for said worship, as also a house for the clergyman, and a school house. And the deed further went on to state, that the grant thereby made was upon the express condition that the grantees, or *cestuis que trust*, or some of them, should *build and finish*, within two years from the 9th of November 1822, on the lot thereby conveyed, a church or meeting-house, for the public worship of God, and should also build and finish, within three years, a suitable dwelling-house for the clergyman, and a school house; and in case said church or meeting-house, and parsonage house, and school house should not be built on said lot and finished within the respective times named, then the land granted, with its appurtenances, was to revert to said Proprietors of the Canal Bridge.

Had this deed stopped here, it would have been at least clear and intelligible, and in conformity with the votes of the corporation, under which the deed was executed by its officers. The purpose of the trust was to secure the erection of the required buildings within the times limited, with a view to the encouragement of inhabitants to purchase and settle on their lands, and thus promote their purposes as a land company having such lots for sale. The condition, as thus far expressed, was adapted to secure the accomplishment of the declared uses and purposes, and the execution of the declared trusts, by making the forfeiture depend upon the failure to *erect* those buildings within the times respectively limited.

But the deed contained another and distinct condition, in these words: "And this grant is upon this further condition, that the land hereby conveyed shall be forever hereafter appropriated to the maintenance and support of the public worship of God, as hereinbefore specified, and to no other

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uses or purposes whatever; otherwise, the same to revert to the said corporation of the Canal Bridge, as above mentioned."

It is upon the alleged breaches of this last condition that the demandants at last rely. In the original specification of claim, breaches were assigned, of the first condition, that the grantees did not erect and build the required buildings within the times limited. But they have been waived, and it is conceded that a church edifice, a school house, and a dwelling-house suitable for a parsonage, or clergyman's house, were built within the times limited, or within the term to which the time had been extended by the grantors. The breaches relied on all consist of acts alleged to have been done by the grantees or their assignees, tending to prevent the appropriation of the whole of the granted premises directly to the support of public worship; as, for instance, by using parts of it, not adapted to or capable of being used for the direct purposes of public worship, to other purposes, by mortgaging or leasing parts of it, by which it may be diverted from such use.

This brings us directly to the consideration of the legal character and effect of this condition. It is contended by the tenants, that this last condition is inconsistent with and repugnant to the grant, the *habendum*, the trusts, and express prior condition of the deed, and is therefore void.

Upon the fullest consideration, the court are of opinion that this last condition is repugnant to the foregoing parts of the deed, and is void. It is not only another and further condition superadded to those which preceded it, but they are repugnant, and cannot both be complied with; so that a compliance with one would be a violation of the other. If the last condition requires the grantees to appropriate the entire premises exclusively to the purposes of public worship, it is impossible to comply with the other condition, to erect a school house and parsonage. If this condition does not require the grantees to appropriate the whole of the granted premises to the support and maintenance of public worship, and to no other uses or purposes whatever, then no breach has been assigned or proved.

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Now, finding that the two conditions are repugnant, and cannot both be complied with, one or the other must yield; and, in determining which, we consider that the former is more favorable to the grantees, that it is most reasonable, and best adapted to carry into effect the objects and purposes of the grant; and we are of opinion that it must stand, and that the subsequent condition must be held void.

Such being, in our view, the true construction of this deed, it is satisfactory to believe that such was the construction of the grantors themselves. When the buildings were erected and completed, as the grantees supposed, in fulfilment of the conditions of the deed, a committee was appointed on their request, to examine and report, whether the conditions had been performed. This committee reported that they had been, and this report was accepted by vote of the demandants. And, without laying any stress on the previous votes of the company, as evidence to control their deed and vary its construction from that which its terms would purport, we may remark that the first condition was the one apparently regarded by those votes as the one relied on and intended to be inserted, and that the last condition seems to have been inserted without the authority of any vote of the corporation, which now appears.

Demandants nonsuit, in both actions.

JOHN A. KNOWLES *vs.* JOHN M. MAYNARD.

A. mortgaged real estate to B., and subsequently leased it, by indenture, to C., for five years, reserving rent payable yearly, and then assigned his interest in the lease to K.: Between five and six months after the date of the lease, B. entered upon the premises for condition broken, to foreclose the mortgage, and C. attorned to him, and afterwards accounted with him for the first year's rent reserved in the lease: K. brought an action against C., on a *quantum meruit* count, to recover a portion of the first year's rent. *Held*, that the action could not be maintained.

THIS was an action of debt for rent of a stable, &c. The plaintiff declared on the lease hereinafter mentioned, and

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added a count on a *quantum meruit* for use and occupation. The parties submitted the case to the court, upon the following agreed statement of facts:

"Isaac Appleton, by an indenture dated April 30th 1844, leased to the defendant, for five years from the 1st of May 1844, a certain stable and sheds in Lowell, at a yearly rent of $250, payable yearly; which sum is a fair rent of the demised premises. On the 10th of May 1844, said Appleton assigned said lease to the plaintiff, who immediately gave notice of said assignment to the defendant. The defendant continued to occupy said demised premises until the commencement of this action, (August 18th 1845,) and still occupies them. On the 19th of October 1844, John and Daniel Ordway, having a mortgage on said premises, which was made before the date of the lease aforesaid, to wit, on the 2d of November 1837, made peaceable entry upon said premises, under said mortgage, for condition broken, and to foreclose the same, and claimed of the defendant the rent accrued and accruing under the said lease. The defendant thereupon attorned to said Ordways, and agreed to pay the rent to them. Afterwards, to wit, on the 11th of April 1845, the defendant purchased said mortgage of said Ordways, and still holds the premises under said purchase. The said Ordways claimed the rent that had accrued under said lease, and at the time of said purchase of the mortgage by the defendant, the rent from the date of the lease was taken into account between said Ordways and the defendant; and the defendant made the purchase of the mortgage with the express understanding between him and said Ordways that the rent should be extinguished."

The agreement of the parties was, that if, upon the foregoing facts, the plaintiff was entitled to recover, the defendant should be defaulted, and judgment be rendered for the plaintiff for such sum as the court should order; otherwise, that the plaintiff should be nonsuited.

Hopkinson, for the plaintiff. As the lease was made after the mortgage, by the mortgagor, and the plaintiff was re

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party to the agreement with the Ordways, he claims an apportionment of the rent.

It seems to be understood that rent is not apportionable. *Fitchburg Cotton Manufactory Corporation* v. *Melven*, 15 Mass. 268, and *Smith* v. *Shepard*, 15 Pick. 147. But those were actions of covenant broken. In an action of assumpsit or debt on a *quantum meruit* for use and occupation, it is submitted that the law is otherwise.

The defendant was not bound to pay to the mortgagees the rent due before they entered; and for that rent he is liable to the plaintiff. And, as was said by Jackson, J. in 15 Mass. *ubi sup.* equity requires that "he should pay a *quantum meruit.*" In *Cook* v. *Jennings*, 7 T. R. 384, Lord Kenyon did not deny that freight might be apportioned, according to equity, on a *quantum meruit*, though it could not be in an action of covenant on the charter-party of affreightment.

Wentworth, for the defendant. A mortgagee is not legally or equitably bound, in any way, to a lessee who takes a lease after the mortgage. *Keech* v. *Hall*, 1 Doug. 21. And such lessee is bound to pay rent to the mortgagee. *Moss* v. *Gallimore*, 1 Doug. 279. See also *Pope* v. *Biggs*, 9 Barn. & Cres. 245. 4 Kent Com. (5th ed.) 165. *Babcock* v. *Kennedy*, 1 Verm. 457. *Smith* v. *Shepard*, 15 Pick. 147. *Welch* v. *Adams*, 1 Met. 494. *Stone* v. *Patterson*, 19 Pick. 476. *Burden* v. *Thayer*, 3 Met. 76. *Massachusetts Hospital Life Ins. Co.* v. *Wilson*, 10 Met. 126. *Wood* v. *Partridge*, 11 Mass. 488. *Boardman* v. *Osborn*, 23 Pick. 299. 3 Kent Com. (5th ed.) 470. Smythe Land. & Ten. 81.

An action on a *quantum meruit* count will not lie to recover what is stipulated for by deed. *Codman* v. *Jenkins*, 14 Mass. 93.

Wilde, J. We think this case cannot be distinguished from that of *Welch* v. *Adams*, 1 Met. 494, and several other cases cited by the defendant's counsel. In the case of *Welch* v. *Adams*, it was decided that the tenant of a mortgagor was not liable for rent that accrued after the mortgagee had entered and required that the rent should be paid to himself, and

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the tenant had agreed to pay him. The case of *Smith* v. *Shepard*, 15 Pick. 147, was decided on the same principle, which is, that the mortgagee, having a title paramount, has a right to enter on such lessee and evict him; to prevent which, the lessee has the right to pay the rent to the mortgagee. If the lessee had refused to pay the rent, and he had thereupon been ousted or evicted by the mortgagee, the mortgagor would not have been entitled to the rent. It was so decided in *Fitchburg Cotton Manuf. Corporation* v. *Melven*, 15 Mass. 268. It follows conclusively, that the lessee, in the present case, had a right to attorn to the mortgagee, and to pay the rent to him.

It was argued for the plaintiff, that he was entitled to the rent accrued before the entry of the mortgagee; and this would be true if the rent had accrued, and was payable before the entry; as was decided in the case of *Massachusetts Hospital Life Ins. Co.* v. *Wilson*, 10 Met. 126. But in the case at bar, the rent was payable annually, and no rent was due at the time of the entry of the mortgagee; and there can be no apportionment of the rent. Nor is the defendant liable on an implied promise.

Judgment for the defendant.

EPHRAIM BUTTRICK *vs.* ASA HOLDEN & another.

H. made a written agreement with B. to convey certain real estate to B. within twenty days, and, before the expiration of twenty days, conveyed the estate to A.: B. brought a bill in equity against H. and A. for a specific performance of H.'s agreement, and alleged in the bill, that H. and A. unlawfully combined to defraud him, and that H. fraudulently conveyed the estate to A., without consideration and that A., before H.'s conveyance to him, had been informed, or had reason to believe, that H. had before contracted to convey the estate to B.: A., in his answer, denied that the estate was conveyed to him without consideration, or that there was any unlawful combination between him and H.; but he admitted that, before H. conveyed the estate to him, he had been informed, and that he believed that H. had made some bargain with B. respecting said estate; but that he had been informed that the bargain had ceased to be binding, and that H., when he conveyed the estate to him, informed him that he (H.) had good right to sell the

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same to him, and that he had no reason to believe, and did not believe or suspect, that H. was under any obligation, at the time when he conveyed the estate to him (A) to convey it to B. *Held*, that this answer put B. to the proof of the facts alleged in the bill; and that upon the answer, it did not appear that A. had such notice of H.'s agreement with B., as would entitle B. to a decree against A. for a conveyance of the estate to B.

Wilde, J. This is a bill to enforce specific performance of a written contract by which Asa Holden, one of the defendants, agreed with the plaintiff, to convey to him al. Holden's right and title to sundry parcels of real estate, with a release, by his wife, of her right of dower, within twenty days from the date of the agreement, upon the plaintiff's paying him four hundred dollars, and the costs of a certain suit. The bill alleges that, within the twenty days, the said Holden fraudulently conveyed all his right and title to said parcels of land to Liberty Bigelow, the other defendant, who holds the same in trust for the said Holden, he not having paid to the said Holden, nor become bound to pay him any consideration for the conveyance; and that, before the said conveyance to the said Bigelow, the said Bigelow had been informed, or had reason to believe, that the said Holden had before contracted to convey the same parcels of land to the plaintiff.

The case has been heard on the bill and answers, and the principal question to be decided is, whether the defendant Bigelow, at the time of his purchase from Holden, the other defendant, knew, or had been informed, or had reason to believe, that the said Holden had contracted to convey the premises to the plaintiff, as alleged in the bill. If so, then he should be decreed to convey to the plaintiff, in the same manner as Holden. *Champion* v. *Brown*, 6 Johns. Ch. 402.

In his answer, the defendant Bigelow admits that he had been informed, and believes it to be true, that the said Holden had made some bargain with the plaintiff respecting the premises; but that he had been informed that the contract had ceased to be binding, and that Holden, at the time of his bargaining with him for the premises, informed him (the said Bigelow) that he had good right to sell the same to him, and hat he, the said Bigelow, had no reason to believe, and did

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not believe or suspect, that the said Holden was under any obligation, at the time of the conveyance to him, the said Bigelow, to convey the premises to the plaintiff. He denies, also, that the premises were conveyed to him without consideration, or in trust for said Holden; and also denies all unlawful combination with the said Holden, as charged in the bill.

It has been argued for the plaintiff, that general allegations, in an answer containing matters of belief, and conclusions from facts not particularly stated, are entitled to little or no weight; and that the rule, requiring two witnesses to contradict such allegations, does not apply. It is so said in 2 Daniell Ch. Pract. 984, *note*. But it is added, that the only effect of such an answer is, to put the plaintiff to the proof of the facts alleged. This effect, we think, is sufficient, in the present case, upon a hearing on the bill and answer. The court, in such a case, will believe what the defendant believes; nothing being proved to the contrary. It is for the plaintiff to prove the allegations in the bill, which are denied by the answer.

It has been argued, that the defendant Bigelow, having heard that Holden had contracted to convey the premises to the plaintiff, was bound to make inquiry, although he was at the same time informed that the contract had ceased to be binding. But this would be a hard rule, if the defendant Bigelow believed, as he says he did, the whole information he received. And why was he bound to believe one part of the information, and to suspect the other part? Vague reports, and rumors from strangers, as Story, J. remarked, in *Flagg* v. *Mann*, 2 Sumner, 551, are not a sufficient foundation on which to charge a purchaser with notice of a title in a third person. And in *Hine* v. *Dodd*, 2 Atk. 275, where the question was, whether the defendant's claim under a registered mortgage should be postponed to the plaintiff's claim under a prior judgment, upon the ground that the defendant had notice of the judgment before the mortgage was executed, Lord Hardwicke remarked, that "apparent fraud, or clear and undoubted notice, would be a proper ground of relief; but

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suspicion of notice, though a strong suspicion, is not sufficient to justify the court in breaking in upon an act of parliament," "or" (as Judge Story remarks, in citing this case) "upon the legal rights of a purchaser." See also *Wildgoose* v. *Wayland*, Gouldsb. 147. Sugden on Vendors, *c.* 23, §§. 2, 3. These principles seem to us to be well founded, and are decisive of the present case.

The defendant Bigelow is charged with a fraud, and a gross fraud, by combining with Holden, the other defendant, to deprive the plaintiff of the benefit of a lawful contract. Of this there is no proof, and the whole charge is denied by both the defendants. Bigelow, therefore, must be considered a *bona fide* purchaser; and it is unnecessary to consider the question, whether Holden would be liable, if he had not conveyed the premises. If Holden has broken his contract, the plaintiff's remedy is against him for damages. A decree against Holden for specific performance would be useless; for if he performed the decree, the plaintiff would obtain no benefit. Bigelow would still hold the estate.

Bill dismissed.

Buttrick, pro se.
Bancroft, for Bigelow.
E. R. Hoar, for Holden.

SAMUEL C. SHAPLEIGH *vs.* THOMAS WENTWORTH.

When a jury are rightly instructed by the court, that their verdict should be for the plaintiff, if they find two specific facts, and the jury return a verdict for the plaintiff, stating therein that they return such verdict on the ground that they find one of those facts, the court cannot order the verdict to be amended and entered as a general verdict for the plaintiff.

TROVER for household furniture. Writ dated August 3d 1844. At the trial in the court of common pleas, before *Washburn*, J. the plaintiff produced a mortgage of the articles described in his writ, made to him by A. T. Bruce, dated December 9th 1843, to secure a note for $109, made by said

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Bruce to him, bearing the same date, and payable in thirty days.

The defendant justified the taking of the said articles, as an officer, by virtue of a writ against said Bruce, in favor of one Wheeler, his creditor, in which the defendant attached said articles, on the 15th of July 1844. And he admitted that the plaintiff, after the defendant attached the articles, seasonably gave the defendant notice of the mortgage, and the amount due on the note, and duly demanded of him payment of that amount, pursuant to the Rev. Sts. *c.* 90, § 79.

Three questions were raised in the case, in regard to which evidence was introduced. The first was, whether the mortgage was *bona fide*, or fraudulent as against Bruce's creditors. The second related to Bruce's place of business, and whether the mortgage, in order to its validity, as against third persons, ought, by *St.* 1843, *c.* 72, § 2, to have been recorded in Lowell, as well as in Dracut, where Bruce lived, and where it was recorded. The third question arose upon the following testimony: A witness for the defendant testified, and the fact was not controverted, that in the forenoon of the day on which Wheeler's writ was made and served, (July 15th 1844,) the present plaintiff, having learned that Bruce "had gone into insolvency," went into Bruce's house, where the mortgaged property was, to find said property, and opened drawers, and, in the language of the witness, "made havoc amongst it," and exercised such control over it as he pleased; but the testimony did not show whether he retained possession of it till Wheeler's writ was served, or went away, leaving it in Bruce's possession. The testimony further tended to show that Wheeler lived in the house with Bruce, and knew of the mortgage, and what the plaintiff had done, as above, before he sued out his said writ.

The plaintiff's counsel contended, that if Wheeler knew of the existence of the mortgage, before suing out his writ, he could not contest its validity, on account of its not having been properly recorded.

The judge instructed the jury, that "if they found the

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mortgage fraudulent, they should return a verdict for the defendant: That if Bruce's principal place of business was in Lowell, the recording of the mortgage in Dracut was not sufficient to give effect to it as a mortgage legally recorded: That if the mortgage was legally recorded, it was equivalent to a delivery of the mortgaged property, so as to give full effect to the mortgage; but if it was not so recorded, it did not take effect without some delivery of the property under it; and that a mere knowledge, by a creditor, that it had been executed, would not give it effect, so as to defeat such creditor's attachment of the property included in it: That if Shapleigh, the mortgagee, took actual possession of the mortgaged property, under his mortgage, before the property was attached by Wheeler, and Wheeler knew of the mortgage, and that Shapleigh had possession of the property, at the time of the service of his writ, the mortgage would have the same effect, as respected such attachment, as if it had been duly recorded prior to that time."

The jury retired in the early part of the evening of the day of the trial, and the officer was directed, by the judge, to suffer them to separate, after having agreed upon and sealed up their verdict. This they did, and returned into court, the next morning, with a sealed verdict, which, upon being opened, was found to be in the following form: "The jury have agreed to render a verdict for the plaintiff, on the ground that Mr. Wheeler was knowing to the existence of the mortgage, before the attachment; and render the amount due to the plaintiff, ninety nine dollars and forty five cents."

The plaintiff thereupon moved, that the jury be instructed to retire and bring in a verdict for the plaintiff, or defendant, according to the instructions they had received; or that they be directed to return a general verdict for the plaintiff, upon the foregoing finding; or that judgment should be rendered upon it, as a general verdict. The defendant objected. The judge, not deeming himself authorized to commit the case again to the jury, under instructions, inasmuch as they had been permitted to separate, directed the verdict to be amended

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so as to be in the form of a general verdict for the plaintiff; which was done, and the verdict, so amended, was affirmed and recorded. To this proceeding the defendant alleged exceptions.

B. F. Butler, for the defendant. A verdict must find all the material matters in issue, or it cannot stand. 6 Dane Ab. 236. *Easton* v. *Collier*, 1 Missouri Rep. 421. In the present case, the verdict has not found facts sufficient to sustain it under the instructions of the court. The *St.* of 1843, *c.* 72, § 2, requires that a mortgage of goods shall be recorded in two towns, in certain cases. The jury have not passed upon that fact. Besides; there was no evidence that the plaintiff ever had possession of the mortgaged property; and the jury have not found that he had. They have only found that "Wheeler was knowing to the existence of the mortgage, before the attachment." This fact alone does not warrant a verdict for the plaintiff.

A special verdict cannot be enlarged by construction. *Lawrence* v. *Beaubien*, 2 Bailey, 623. *Little* v. *Larrabee*, 2 Greenl. 37.

J. G. Abbott, for the plaintiff. The court can amend a verdict, and "work it into form," if it can be understood, and enter it as a general verdict. Before a verdict, which is out of the common form, is affirmed, there is always a discussion between the judge and the jury, and the jury's meaning is ascertained. See *Foster* v. *Jackson*, Hob. 54. *Porter* v. *Rummery*, 10 Mass. 64. *Hawks* v. *Crofton*, 2 Bur. 698. *Ropps* v. *Barker*, 4 Pick. 242.

The *St.* of 1843, *c.* 72, as to recording a mortgage in the town where the mortgagor principally transacts his business, as well as in the town where he resides, is merely directory. Notice of the mortgage is sufficient; actual notice being better than constructive notice by the record. See *Carrington* v. *Smith*, 8 Pick. 419. *Adams* v. *Wheeler*, 10 Pick. 199.

The court of common pleas, in ordering the verdict to be entered as a general verdict, exercised a discretionary power

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with which this court will not interfere. *Whitney* v. *Thayer*, 5 Pick. 528.

Butler, in reply. In *Roberts* v. *Rockbottom Co.* 7 Met. 46, this court interfered with the exercise of the discretionary power of the court of common pleas to work a verdict into form.

SHAW, C. J. Without deciding the question, whether an unrecorded mortgage of personal property is valid against an attaching creditor with notice, the court are of opinion that this verdict cannot be sustained.

The verdict, as first returned, was not such as to warrant a direction to the jury to change their finding, as of course, into a general verdict for the plaintiff. They had been directed, that if the attaching creditor had actual notice, and if the mortgagee took actual possession before the attachment, and retained it till the property was attached, they should find for the plaintiff. The jury returned the first fact, that the attaching creditor had notice, and said nothing of the other, viz. whether the mortgagee took and retained possession. Without the latter, it is very clear that the mortgage could not be valid; and that it afforded no authority to enter a general verdict for the plaintiff. See *Travis* v. *Bishop*, (*ante*, 304.)

Verdict set aside, and a new trial ordered.

ROYAL CALL *vs.* SOLOMON C. CALEF.

A. had an interest in the exclusive use, in Manchester, (N. H.) of a certain patent machine, and B. had an interest in the exclusive use of the same machine in Lowell: S. was using said machine, in Manchester, without right: A. gave to B. a power of attorney, authorizing him to take such steps, in A.'s name, as B. might judge to be necessary or expedient, by suit at law or otherwise, to prevent S. from using, letting or selling said machine, in Manchester, and also authorizing B. to sell to S. the right to use said machine in Manchester: And by a parol agreement between A. and B., B. was to have, as his compensation for his services under said power of attorney, one half of what he should recover or receive of S.: B. rendered services, under said power, for which he was entitled, by said parol agreement, to twenty five dollars: A. afterwards assigned his right to the use

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of said machine to C., with notice of B.'s claim on A., and with authority to C. to revoke said power of attorney given to B., upon paying B. twenty five dollars: C promised B. to pay him said sum, and B. consented to the revocation of the power of attorney: B. afterwards brought an action against C. to recover said sum of twenty five dollars. *Held*, that the parol agreement between A. and B. was not illegal and void on the ground of maintenance and champerty, but was a valid agreement; that C.'s promise to pay B. said sum was on a good and sufficient consideration; and that the action could be maintained.

ASSUMPSIT, on the money counts, to recover twenty five dollars. At the trial in the court of common pleas, before *Wells*, C. J. the plaintiff gave evidence that, on the 19th of February 1845, the firm of Harry Leeds & Co. of Manchester (N. H.) made to him a power of attorney, the purpose of which was expressed in these words: "For us, and in our names, to take such steps as he shall judge to be necessary and expedient, either by suit at law or otherwise, to prevent Baldwin & Stevens of Manchester from running or using, in any way, or letting to others, or selling, Hutchinson's Patent Planing Machine, which we have the exclusive right to use in the town of Manchester, and the exclusive right to sell the right to use the same in the said town of Manchester. And we further authorize and empower our said attorney, for us, and in our name, to sell to said Baldwin & Stevens, at such price as he shall think reasonable, the right to use one, and one only, of Hutchinson's Patent Planing Machines in said town of Manchester. And we hereby ratify and confirm all the lawful doings of our said attorney in the premises, and give him power to do all things necessary to the execution of this trust, as fully as we ourselves could do, if personally present and acting in the premises."

The plaintiff also gave evidence that, at the time when this power of attorney was given to him, the said Harry Leeds & Co. claimed to be the sole owners of the Hutchinson patent, for the said town of Manchester, and that the plaintiff was largely interested in the same patent right, in the city of Lowell; and he offered to prove that Baldwin & Stevens were running one of said planing machines in Manchester, alleging that the patent was void. It was in evidence

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that when said power of attorney was given, it was agreed between the parties thereto that the plaintiff was to receive, for his personal services rendered under said power, one half of all that he might receive or collect by virtue of said power; and that said power was executed at said Manchester.

The plaintiff also offered to give evidence tending to prove that he had rendered services, in selling said machine, under said power of attorney, and that, after said services had been rendered, the said power was given up, and that the defendant became liable to pay the sum of twenty five dollars for such services and the giving up of said power.

The judge ruled that the contract made by the parties to said power of attorney, as to the manner in which the plaintiff should be paid for his services, was void, as against the policy of the law, and illegal, and that no action could be maintained for services rendered under said power; and he directed a verdict for the defendant, which was returned by the jury. The plaintiff alleged exceptions.

Before the argument, the parties agreed that the evidence which the plaintiff offered to give at the trial, and which was contained in depositions, should be considered by the court, and that the bill of exceptions should be deemed amended accordingly. The additional facts, contained in those depositions, are stated in the opinion of the court.

J. G. Abbott, for the plaintiff.

Morse, for the defendant.

Shaw, C. J. As we understand the case, it was as follows. Leeds & Co. claimed to have an interest in the exclusive use of a patent planing machine in the town of Manchester, N. H., in which town Baldwin & Stevens were working the same machine, as Leeds & Co. alleged, without right. Call, the plaintiff, had an interest in the same patent at Lowell. Leeds & Co. executed a power of attorney to Call, the plaintiff, authorizing him, by suit or otherwise, to restrain Baldwin & Stevens from using the machine at Manchester, and promised him half of what he should recover or receive for his compensation. Call took some measures under this authority,

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and afterwards Leeds & Co. assigned their interest to the defendant, Calef, with notice of Call's claim, and with power to revoke the power given to Call upon paying him what was due to him. Calef and Call had an interview, at which the former promised to pay the plaintiff twenty five dollars for his services, for which this suit is brought, and Call consented to the revocation of the power of attorney. The defence is, that this original agreement between the plaintiff and Leeds & Co. was void, on the ground of maintenance and champerty.

The court are of opinion, that this forms no good defence. Manchester and Lowell were towns near each other; and the unauthorized use of the patent right in one would diminish the value and profits of the patent in the other. Therefore the plaintiff had a direct interest, concurrent with that of Leeds & Co., in preventing the violation of the patent right, so that an agreement to act in the name of the patentee, or his assigns, to prevent such violation, and bring suits, if necessary, for that purpose, in the benefit of which he would largely, though indirectly, share, was not such unlawful maintenance or champerty as to render the agreement void.

There was a good consideration for this promise from the defendant to the plaintiff, in this: Leeds & Co. assigned their rights to the defendant, and authorized him to revoke the plaintiff's authority, on payment of his costs, and the assent of the plaintiff to such revocation constituted a good consideration for the express promise.

Verdict set aside, and a new trial ordered.

COMMONWEALTH *vs.* OLIVER BROWN.

On the trial of an indictment, which alleged that the defendant erected and maintained a building for the purpose of manufacturing neat's-foot oil therein, and boiled and tried putrid meats, &c. therein, by means whereof noisome and offensive smells issued from the building, to the common nuisance of the citizens, it appeared in evidence that noisome and offensive smells issued from other parts of the defendant's premises, near the said building, by reason of the use made

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near thereto, but not therein, of the materials boiled and tried in the building. *Held*, that the jury, in deciding whether the defendant was guilty of the offence charged in the indictment, could not take into account any offensive smells that did not issue from the building.

The indictment in this case alleged, that the defendant, on the 1st of January 1845, at Charlestown, "near to a public street and common highway there, and also near to the dwelling houses of divers citizens there situate and being, did unlawfully erect, build and maintain a certain building, for the purpose of making and manufacturing neat's-foot oil therein, and did unlawfully and injuriously make and set up, place and maintain, in the said building, divers furnaces, stoves, caldrons, coppers and boilers, to wit, five furnaces, five stoves, five caldrons, five coppers, and five boilers, for the purpose of boiling and trying putrid meat, bones, heads, feet and other materials used in the manufacture of neat's-foot oil; and that he, on the day and year aforesaid, and on divers other days and times," &c. "unlawfully and injuriously did boil, try and mix together divers large quantities of putrid meat, bones, cattle's heads, and cattle's feet, and other materials used in the making and manufacturing of neat's-foot oil, for the purpose of making and manufacturing the same into neat's-foot oil; by reason of which said premises, divers noisome and unwholesome smokes, vapors, smells and stenches, on the days and times aforesaid, were emitted and issued from the said building, so that the air, on the several days and times aforesaid, at Charlestown aforesaid, was thereby greatly filled and impregnated," &c. "and was rendered, and became and was corrupted, offensive and unwholesome; to the great damage and common nuisance," &c.

At the trial in the court of common pleas, before *Cushing*, J. it appeared that the defendant was the owner of a lot of land, in Charlestown, extending from Main Street to tide water in Miller's River; that his dwelling-house stood on the end of the lot next to the street, and that at the other end of the lot, he had a building, two stories high, built about fifteen years before the trial, standing 200 feet or more from said

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street, in which building he had for many years carried on the business of making neat's-foot oil, by boiling cattle's heads, feet, &c. And there was evidence tending to prove that the process of boiling produced very noisome and offensive smells. It was also in evidence, that the defendant kept hogs in a yard at the west end and south side of his oil works, and that the bones and other materials used in making the oil, after being boiled and the oil taken off, were thrown into the hog yard, and that, after the hogs had eaten off the fleshy parts, the bones were thrown into a separate enclosure, where they were stirred up, from time to time, in order that they might be washed by the tide water; that the bones were carted away from this enclosure, at different times, as purchasers wanted them. And there was evidence tending to show that the emptying of the kettles, the stirring up and the carting away of the bones, produced an intolerable stench.

On this evidence, the defendant contended that, as it was alleged in the indictment, that the stenches, which caused the supposed nuisance, were emitted and issued from the defendant's building, the jury must confine themselves to the consideration of the smells proved to have issued and been emitted from the building, and could not take into account, in finding their verdict, any stenches arising from other parts of the defendant's premises. And the defendant requested the court so to instruct the jury. But the court declined to give such instruction, and instructed the jury that, in deciding the question of the defendant's guilt, they might take into account, not only such smells as were proved to have issued from his building, but also the smells and stenches arising from any part of his premises occupied for the purpose of making neat's-foot oil. The jury returned a verdict against the defendant, and he alleged exceptions to the said instructions.

Buttrick, for the defendant.

Nelson, (District Attorney,) for the Commonwealth.

Shaw, C. J. The defendant contended, at the trial, that the jury, under this indictment, must be confined to the smells

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emitted from the building, and could not consider those proceeding from other causes. But the court refused so to instruct the jury, but instructed them, that in deciding the question of the defendant's guilt, they might take into account not only such smells as issued from his building, but also the smells and stenches arising from any part of his premises occupied for the purpose of making neat's-foot oil.

It appears to the court, that this direction was too broad, and permitted the defendant to be found guilty of a nuisance not charged in the indictment. Without going back to the critical niceties, which have sometimes been resorted to, in considering the sufficiency of an indictment, it is a great and salutary principle of the common law, sanctioned and enforced by our declaration of rights, art. 12, that the crime or offence, to which a man is called to answer, shall be "fully and plainly, substantially and formally described" in the indictment. It is to that alone he answers; that alone is within the issue, and is the subject of proof.

In applying these rules, it appears to us, that the nuisance, arising from the hog yard and heaps of bones, was not charged in the indictment, was not traversed by the plea, and of course not in issue, and could not be taken into consideration, in deciding the question, whether the defendant was guilty on that indictment.

Verdict set aside, and a new trial granted.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF BRISTOL, PLYMOUTH, BARNSTABLE AND DUKES COUNTY, OCTOBER TERM 1847, AT PLYMOUTH.

PRESENT.

Hon. LEMUEL SHAW, Chief Justice.
Hon. SAMUEL S. WILDE, } Justices
Hon. CHARLES A. DEWEY, }

Samuel W. Look *vs.* Thomas Bradley.

When the right of all the inhabitants of a town to fish in a certain pond and creek is tried on the general issue, in a suit between two of them, the other inhabitants are competent witnesses to prove such right, although the defendant files a specification of defence, in which he sets forth such right. *Aliter*, before St. 1836, c. 273, when such right was put in issue on a special plea in bar.

Trespass for breaking and entering the plaintiff's close in Tisbury, in the county of Dukes county, subverting his soil, tearing down his building, and taking and carrying away fifty thousand alewives from his fishery in said close.

The defendant pleaded the general issue, and filed the

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following specifications of defence: 1. That, at the time of the alleged trespass, the plaintiff was not the owner of the soil upon which the acts, charged to have been done by the defendant, were committed; and that the plaintiff was not in possession of the same. 2. That, at the time of the alleged trespass, and for more than forty years prior thereto, all the inhabitants of the town of Tisbury had an easement, or right of way, to pass and repass over all the lands described in the plaintiff's writ, and to remain there, for the purpose of taking fish in Chappaquonsett Pond and Creek, and that no person has, during all that period, held any title to said lands, except as subject to the easement aforesaid. 3. That, at the time of, and long prior to, the acts complained of, there had been a clear dedication to the public of the use of the lands aforesaid, or so much thereof as is necessary for fishing in Chappaquonsett Pond and Creek. 4. That, at the time of the alleged trespass, there was, and prior thereto, from time immemorial, there had been, in the waters of Chappaquonsett Pond and Creek — the same being the premises described in the plaintiff's writ — a common and free fishery for the taking of alewives and herrings, by all the inhabitants of Tisbury, which the plaintiff, against law, and without right, had heretofore attempted to convert into an exclusive fishery for his own use; and that all the acts, done and committed by the defendant, were done in the exercise of his legal rights, for the protection and preservation of the common and free fishery aforesaid.

At the trial, at the last May term at Barnstable, before *Hubbard*, J. the defendant, to prove the facts relied upon in his specifications aforesaid, offered John Holmes as a witness. He was objected to by the plaintiff's counsel, on the ground that he was an inhabitant of Tisbury, and therefore interested in the event of the suit; and the judge ruled that he was not a competent witness, for the reason above stated, and rejected his testimony. The defendant was thereupon defaulted, under an agreement that if the whole court should be of opinion that the above ruling was correct, the inhabitants of Tisbury

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should be excluded as witnesses; and that, if the defendant should offer to prove the facts relied upon by him, by other witnesses, the default should be taken off, and the cause stand for trial.

Clifford, for the defendant. Under the rules of pleading, prescribed by *St.* 1836, *c.* 273, the cases of *Lufkin* v. *Haskell*, 3 Pick. 356, and *Odiorne* v. *Wade*, 8 Pick. 518, on which the judge founded his ruling, are not applicable. In those cases, inhabitants of certain towns were held to be incompetent to prove that all the inhabitants of those towns had the rights which the defendants had put in issue by a special plea. A verdict sustaining or negativing such a plea would be evidence for or against any other inhabitant, on the trial of the same question. And so all the inhabitants would be interested in the event of the suit, and not competent witnesses. But under the general issue, which alone can be now pleaded, a judgment or verdict would have no such effect. It would not appear that the verdict was founded on any such right as is suggested in the specification. So that the inhabitants of Tisbury are interested only in the question, and not in the event of the suit, and are competent witnesses for each other, according to the doctrine established in *Bent* v. *Baker*, 3 T. R. 27, and never since questioned. See 1 Greenl. on Ev. §§ 175, 331, 386 *& seq.* *Smith* v. *Sherwood*, 4 Connect. 276.

Z. Scudder, for the plaintiff. If a specification of defence, under *St.* 1836, *c.* 273, is not to be taken as a plea in bar, and to have the same effect, so far as it respects the present question, then the competency of witnesses is affected by a new rule of pleading, which was not established with a view to any such effect. See *Prewit* v. *Tilly*, 1 Car. & P. 140. 1 Greenl. on Ev. § 405. *Lord Falmouth* v. *George*, 5 Bing. 286. *Gould* v. *James*, 6 Cow. 369. *Moore* v. *Griffin*, 9 Shepley, 350.

A prescription for a common right of fishery, as appurtenant to a particular township, is void, and as absurd as a prescription would be for travelling the king's highway, as

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appurtenant to a particular estate. Angell on Tide Waters, (2d ed.) 274.

Shaw, C. J. We think the inhabitants of Tisbury were competent witnesses, and should have been admitted. In *Lufkin* v. *Haskell*, 3 Pick. 356, and *Odiorne* v. *Wade*, 8 Pick. 518, it was decided, that the inhabitants were not competent to prove a right of way for all the inhabitants, or a right in all the inhabitants to take shell fish. The right for all the inhabitants, not as a corporation, but as individuals, was put in issue, and the cases were decided upon the ground that a verdict against the plaintiff would, by the common law, be evidence, if not a bar, in any suit he might bring against any other inhabitant; and so those inhabitants were interested in the event of the suit. *Reed* v. *Jackson*, 1 East, 355. But now, there being no special plea, and no issue joined upon the point of custom, the judgment in this suit could not be used as evidence for or against the witness. The case then is brought back to the general rule, established by *Bent* v. *Baker*, 3 T. R. 27, that where the interest of the witness is in the question, and not in the event of the suit, it is too remote and contingent, and does not render him incompetent.

New trial granted.

Virginia McCall *vs.* Josiah C. Parker, Jr. & others.

By the Rev. Sts. *c.* 49, § 1, an infant, who is accused of being the father of a bastard child, on a complaint made to a justice of the peace by the mother, may be required to give bond, with sureties, to appear and answer to such complaint, at the next court of common pleas, and to abide the order of the court thereon; and his infancy is no defence, either for him or his sureties, to an action on such bond.

In a suit on such bond, given by an infant, neither the principal nor the sureties can defend on either of the following grounds; viz. because it does not appear, from the record of the justice who issued the warrant against the party accused, and before whom the party accused was brought on the warrant, that the mother made complaint to the justice, previously to her examination by him; or because the mother, being an infant, made her complaint personally, and not by her next

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friend or guardian; or because such warrant directed the officer to bring the party accused before the justice who issued it, or before some other justice; or because the warrant directed the officer to bring the party accused before the justice, to find sureties for his personal appearance at the next term of the court of common pleas; or because the order of the justice was, that the party accused should give bond for his personal appearance at court, and to abide and perform the order or orders of the court; or because the accused party's appearance at court was by attorney.

DEBT on a bond, executed on the 28th of February 1846, by Josiah C. Parker, jr. as principal, and the other defendants, as his sureties. The condition of the bond was, that whereas the plaintiff, upon her examination, on oath, before a justice of the peace, had accused said Josiah C. of being the father of a bastard child, of which she was likely to be delivered, and that said justice had ordered him to give sureties for his appearance at the court of common pleas, to be held at Barnstable, in April 1846, then and there to answer to the said accusation; if said Josiah C. should appear at the said court, and answer to the said accusation, and abide the order of the court thereon, the bond should be void; otherwise, should remain in force.

The case was submitted to the court, on the following statement of facts: The plaintiff, on the 25th of February 1846, made complaint in writing, and on oath, to a justice of the peace, alleging that she was with child, and that the child was likely to be born a bastard, and accusing Josiah C. Parker, jr. of being the father of said child, &c. and praying that said Parker might be apprehended, and held to answer to said complaint and accusation. On the same day, said justice issued a warrant against said Parker, directed to the sheriff of the county of Barnstable, or his deputy, or either of the constables of the town of Barnstable, requiring either of them forthwith to apprehend the said Josiah C. Parker, jr. and to bring him before said justice, or some other justice of the peace in and for said county of Barnstable, to find sureties, as well for his personal appearance at the next court of common pleas, &c. as that he should abide such order or orders as should then and there be taken, in pursuance of a

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law of the Commonwealth in such case made and provided The recital, which was in the warrant, and which preceded the aforesaid direction to the officer to apprehend said Parker, was in these words: "Whereas Virginia McCall of Barnstable in the county of Barnstable, single woman, by her voluntary examination, hath declared that she is with child, and that the said child is likely to be born a bastard, and accuses Josiah C. Parker, jr. of Barnstable in the county of Barnstable, mariner, of being the father of said child, and hath prayed process against the said Josiah C. Parker, jr."

The record of said justice showed that said Parker was brought before him, on the 28th of February 1846, "by virtue of a warrant duly issued upon the voluntary examination and accusation of Virginia McCall," (setting forth the substance of said examination and accusation,) and that, upon the reading of said Virginia's accusation to said Parker, and upon his being asked by said justice, whether he was guilty or not guilty of the offence charged upon him in the said examination and accusation, he pleaded and said he was not guilty. The said record then concluded as follows: "But, after a due investigation and examination, it appears to me that the said Josiah C. Parker, jr. is guilty of the offence aforesaid. It is therefore considered and ordered by me, the said justice, that the said Josiah C. Parker, jr. give bond in the sum of five hundred dollars, with sufficient sureties, for his personal appearance at the next court of common pleas to be held," &c. in April 1846, "to answer to such charge, and to abide and perform such order or orders, as shall then and there be made, and to stand committed till he comply with the above order."

The plaintiff's complaint was entered in the court of common pleas for the county of Barnstable, at April term 1846, when the parties appeared; and it then appearing that the complainant had not been delivered of the child mentioned in her complaint, the case was continued to the ensuing September term of said court, when, for the same reason, the case was again continued to April term 1847. At that

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term, the said Virginia presented to said court her complaint, alleging therein, by herself, and by her next friend, Charles Lewis, that she was delivered of a bastard child, on the 7th of October 1846; that Josiah C. Parker, jr. of Barnstable was the father of said child, (stating the time and place when and where the child was begotten;) that on the 25th of February 1846, she made complaint to a justice of the peace, (naming him,) "and desired to institute a prosecution against said Parker, whom she then accused of being the father of said child; that thereupon the said justice took her accusation and examination in writing, under oath, respecting the person accused, the time and place when and where the complainant was begotten with child, and respecting such other circumstances as the said justice then judged necessary for the discovery of the truth of said accusation:" That said justice issued his warrant, on which said Parker was arrested and carried before said justice, who, after hearing him in his defence, required him to give a bond to the complainant, with sufficient sureties, in the sum of $500, to appear and answer to said complaint, &c. with which requisition the said Parker complied, as by the record thereof and by the bond, in court to be produced, will appear: That the cause founded upon said accusation was entered in court and continued from term to term: That having been put upon the discovery of the truth respecting said accusation, in the time of her travail in the birth of said child, she did thereupon accuse the said Parker of being the father of said child, of which she was then about to be delivered; and that she had continued constant in such accusation. Wherefore she prayed that the said Parker might be held to answer to her complaint and accusation, and be adjudged the father of said child, and stand charged with the maintenance thereof, with the assistance of the mother, in such manner as the court should be pleased to order.

Charles Lewis appeared and was admitted, by the court, as next friend of said Virginia, (who was then an infant,) to prosecute said complaint; and thereupon the said Josiah C

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Parker, jr. withdrew, and, though solemnly called to come into court and answer to said complaint and accusation, did not appear, but made default.

The said Josiah C. Parker, jr. at the time of the execution of the bond in suit, was under the age of twenty one years, and this fact was known to all parties concerned. At the April term of the court of common pleas, in 1846, and at the following September term, an appearance, by attorney, was entered for said Parker; which appearance was withdrawn at April term 1847. Said Parker was under the age of twenty one years when he was defaulted, as aforesaid, but was more than twenty one years old when the writ in this suit on the bond was served upon him.

Upon these facts, it was agreed by the parties, that if this action were maintainable against either or all of the defendants, the court should "render such judgment therein as to law and justice shall appertain."

Z. Scudder, for the plaintiff. The principal obligor is bound, though he was an infant when he executed the bond. He was required, by the Rev. Sts. *c.* 49, § 1, to execute it. or be committed to prison; there being no exception of infants in the statute, and no such exception being implied, from the nature of the case, or the rules of law applicable to such a case. And infants "are bound by all acts which they are obliged by law to do." Per Parsons, C. J. 6 Mass. 80. Plaintiffs in replevin are obliged to give bonds to the defendant; and it seems from the case of *Blood* v. *Harrington*, 8 Pick. 552, that an infant plaintiff is liable on such bond. So an infant must give a bail bond, if he can have bail; for the sureties on such bond are not liable, unless there is a principal. *Bean* v. *Parker*, 17 Mass. 591. See also *Wood* v. *Washburn*, 2 Pick. 24. An infant, committed in execution, is entitled to a discharge, in New York, on assigning his property; and such assignment is valid, under the statute which authorizes "every person" to make it. *People* v. *Mullin*, 25 Wend. 698. There are divers other contracts by which infants are bound. See Bac. Ab. Infancy & Age, I.

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1 Jarman on Wills, 28. 2 Kent Com. (5th ed.) 243. *Butler* v. *Breck*, 7 Met. 164. They are also liable for costs, in actions which they are enabled to prosecute. *Smith* v. *Floyd*, 1 Pick. 275.

At the worst, the bond is voidable only, and not void as to the principal. *Zouch* v. *Parsons*, 3 Bur. 1799. 1 Amer. Leading Cases, 108 *& seq.* And in such cases the sureties are held, though the principal may avoid the contract.

It will be objected, that the proceedings before the justice were so defective and irregular that the principal obligor may avoid the bond for duress, even if he would otherwise be bound by it. If this were so, the sureties would still be held; duress of the principal being no defence for the surety. *Huscombe* v. *Standing*, Cro. Jac. 187. 20 Amer. Jurist, 26. But there is no fatal defect in those proceedings.

It will be objected, that the warrant, which was issued for the apprehension of the principal defendant, did not allege that the plaintiff's complaint against him was made on oath. But the Rev. Sts. *c.* 135, § 2, do not require this allegation in a warrant in criminal cases, though they require that the complaint shall be on oath. "The substance of the accusation" is all that is required to be recited in the warrant. See *Donahoe* v. *Shed*, 8 Met. 326. *Commonwealth* v. *Moore*, 19 Pick. 339. Besides; the process, on which the principal defendant was arrested, was a civil process, in which, *a fortiori*, the oath need not appear on the warrant. *Marsh* v. *Bancroft*, 1 Met. 497. *Williams* v. *Campbell*, 3 Met. 209. *Marston* v. *Jenness*, 11 N. Hamp. 156.

It will also be objected, that the warrant commanded the officer to bring Parker before the magistrate who issued it, "or some other justice of the peace;" and *Fisher* v. *Shattuck*, 17 Pick. 252, will be relied on. This might have been a fatal objection, if the officer had carried Parker before another justice; but, as he was carried before the proper magistrate, this direction in the warrant may be treated as mere surplusage. See *Chapel* v. *Congdon*, 18 Pick. 257. Besides; this was matter of form only, and should have been

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excepted to at an earlier period. After a party has appeared and given bond, he cannot take this objection. *Robie* v. *McNiece*, 7 Verm. 419. *Schooler* v. *Commonwealth*, Litt. Sel. Cas. 89. *Walker* v. *Commonwealth*, 3 A. K. Marsh. 356. See also *Cooke* v. *Gibbs*, 3 Mass. 193. *Carlisle* v. *Weston*, 21 Pick. 535.

The defendants may perhaps object, that the warrant ordered Parker to be brought before the justice, "to find sureties," instead of ordering that he should be brought, "to be heard," &c. But, if this was a defect in the warrant, it was cured by the subsequent words, viz. "in pursuance of a law of the Commonwealth." Besides; the justice's record shows that Parker was heard, upon being brought before the justice.

The order of the justice will, perhaps, be objected to, because it was for Parker's "*personal appearance*," and "to abide *and perform*" the order or orders of the court; whereas the Rev. Sts. c. 49, § 1, authorize the justice to require a party "to give bond to *appear* and answer, and to *abide* the order of the court." But it is clear that the appearance required by the statute, § 6, is a personal appearance, because, by § 4, the party charged, if found guilty, is to give bond, with sureties. And the word 'perform' means no more than the word 'abide.' See *Taylor* v. *Hughes*, 3 Greenl. 433. *Corson* v. *Tuttle*, 1 Appleton, 409.

The appearance of Parker, by attorney, though he was a minor, is no objection, in proceedings like this. And if he ought, in strictness, to have appeared by guardian, yet the proceedings will stand until reversed on error, or quashed on *certiorari*. *Knapp* v. *Crosby*, 1 Mass. 479. *Austin* v. *Charlestown Female Seminary*, 8 Met. 196. And the plaintiff might well proceed without the intervention of her next friend. *Low* v. *Mitchell*, 6 Shepley, 372.

H. A. Scudder, (*Clifford* was with him,) for the defendants. The proceedings against the principal in the bond were so irregular as to render it void for duress to him. It is also void by reason of his infancy.

I. The irregularities, which put Parker under duress, are

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numerous. (1.) It does not appear that the plaintiff made any complaint to the magistrate, previously to her examination, according to the provision in Rev. Sts. *c.* 49, § 1. (2.) The plaintiff should have proceeded by her guardian or next friend, and not in her own name only. *Hinman* v. *Taylor*, 2 Connect. 357. And this ground of defence can be taken, without bringing a writ of error or of *certiorari*. *Wilbur* v. *Crane*, 13 Pick. 288. See also *Mariner* v. *Dyer*, 2 Greenl. 165. *Marston* v. *Jenness*, 11 N. Hamp. 156. (3.) The bond is void because the warrant, on which Parker was arrested, was void; it being made returnable before "some other justice." *Fisher* v. *Shattuck*, 17 Pick. 252. The officer might have returned the warrant before what justice he pleased. 1 Chit. Crim. Law, 29. The cases cited for the plaintiff, to show that this objection comes too late, were processes against adults. But Parker was an infant, and could not plead nor appoint an attorney to plead for him. This is the first time that he has had a standing in court. There is no estoppel or presumption against him, by reason of any prior proceeding in the case; as there would have been, if there had been an order of filiation, or if he had appeared and pleaded in a legal way. (4.) The warrant was not according to the Rev. Sts. *c.* 49; but Parker was brought before the justice to give bond with sureties for his personal appearance, &c. He was therefore under duress, which avoids the bond. *Richardson* v. *Duncan*, 3 N. Hamp. 508. Bac. Ab. Duress, A. 20 Amer. Jurist, 23. (5.) Parker's appearance should have been by guardian; the proceeding being a civil one. As he did not so appear, the proceedings against him were erroneous, and his detention was duress. *Knapp* v. *Crosby*, 1 Mass. 479. *Hill* v. *Wells*, 6 Pick. 104. *Arnold* v. *Sandford*, 14 Johns. 417. Chit. Con. (5th Amer. ed.) 857. (6.) The Rev. Sts. *c.* 49, § 1, provide that the magistrate, "after hearing" the party in his defence, "may require him to give bond." But an infant cannot appear, except by guardian; nor can he be heard without

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appearing. The magistrate's order was therefore void, and the bond was also void for duress.

The bond was for the appearance of Parker, and for performing the order of court. But it does not appear from the record that he did not appear; and no order was made, which he failed to perform. Admitting the bond to be valid, no breach of it is shown.

II. Infancy is a defence to this bond. The Rev. Sts. *c.* 49, § 1, do not necessarily require the party to give his own bond. The words "any woman," in the same section, do not authorize a married woman to make complaints. And why should the words "the person" or "the party accused" include infants? In Rev. Sts. *c.* 135, § 20, special provision is made for taking the recognizance of married women and minors, as witnesses.

An infant's bond is void at common law; especially where, as in this case, it is a penal bond, and necessarily prejudicial to him. *Whitney* v. *Dutch*, 14 Mass. 461. *Oliver* v. *Houdlet*, 13 Mass. 239. *Vent* v. *Osgood*, 19 Pick. 573. *Jordan* v. *Lovejoy*, 20 Pick. 86. Co. Lit. 172 *a*. *Ayliff* v. *Archdale*, Cro. Eliz. 920. *Charnock* v. *Worsley*, 1 Leon. 114. *Keane* v. *Boycott*, 2 H. B. 511. *Baylis* v. *Dineley*, 3 M. & S. 477. *U. States* v. *Bainbridge*, 1 Mason, 82. At the least, the bond is voidable; and that is sufficient for this defence. And if the principal is not bound, the sureties cannot be held, in a case like this. *Thompson* v. *Lockwood*, 15 Johns. 256. *Fisher* v. *Shattuck*, 17 Pick. 252. *Hazard* v. *Irwin*, 18 Pick. 104.

Wilde, J. Several objections have been raised to the validity of the bond now in suit, arising from the facts appearing by the record of the proceedings before the justice, and in the court of common pleas, upon which I will briefly state the opinion of the court.

Most of the objections are founded on the alleged irregularity of the proceedings; the principal objection being, that the principal defendant was a minor, and that a guardian *ad*

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litem ought to have been appointed to defend him against the plaintiff's accusation. But, admitting that such a guardian should have been appointed, we think it clear that the omission does not render the proceedings void, but only erroneous; and that they are valid, and can only be reversed and set aside on a writ of *certiorari*. And the same principle applies to the other objections to the proceedings. The objection, therefore, that the bond was given under duress cannot be maintained. This case differs from that of *Fisher* v. *Shattuck*, 17 Pick. 252; for in that case the justice had no jurisdiction, and the whole proceedings were *coram non judice*.

The remaining objection to the action is, that the defendants are not liable, because the principal in the bond was a minor. To this objection it has been answered, that the statute requires that the party accused, under the bastardy act, should give bond, and there is no exception of minors, as there is in the Rev. Sts. *c.* 135, § 20, as to witnesses, being married women or minors; and it has been argued, that it must, from the nature of the subject, have been intended that minors should not be excepted. And the rule laid down by Lord Wilmot, as to the construction of similar statutes, is applicable. He says, "many cases have been put, where the law implies an exception, and takes infants out of the general words, by what is called a virtual exception. I have looked through all the cases; and the only inference to be drawn from them is, that where the words of a law, in their common and ordinary signification, are sufficient to include infants, the virtual exception must be drawn from the intention of the legislature, manifested by other parts of the law; from the general purpose and design of the law; and from the subject matter of it." *Earl of Buckinghamshire* v. *Drury*, Wilmot, 194. By this rule of construction, we are of opinion that the Rev. Sts. *c.* 49, § 1, must be so construed as to include infants. The justice is authorized to require the party accused "to give bond, with sufficient sureties, to appear and answer to the said complaint, at the next court of common

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pleas, and to abide the order of court thereon, and may order him to be committed, until such bond shall be given."

From this language of the statute, and the nature of the subject, there seems no reason to doubt that it was intended to include minors. This is not a case entitling the minor to any privilege. He is liable for costs; he may contract marriage; and there appears to be no objection to his giving bond as the statute requires.

Judgment for the plaintiff.

BETHUEL PENNIMAN *vs.* BENJAMIN RODMAN.

P. and R. made a written submission to arbitrators of all accounts, claims and demands which they had against each other, of whatever name or nature; all which claims they agreed to make respectively, each against the other, before the arbitrators, who should consider the same, and whose report should be final: At the time of the submission, there were conflicting claims, between P. and R., respecting certain real estate, and these claims were laid by them before the arbitrators, who awarded, in full of all matters submitted, (among other things,) that R. should convey to P., his heirs and assigns forever, by a deed of warranty, a certain strip of land, and should execute a deed, releasing to P. all R.'s right and estate in a certain passage way, to which land and passage way they had conflicting claims. *Held*, that the terms of the submission included the parties' claims concerning real as well as personal property; that the arbitrators were thereby authorized to direct R. to make such deeds; and that P. might maintain a bill in equity to enforce specific performance, by R., of that part of the award.

WILDE, J. This is a bill in equity to compel a specific performance of the award of arbitrators. The bill sets out the submission, as follows:

"December 21st 1843. Know all men by these presents, that Bethuel Penniman and Benjamin Rodman, both of New Bedford in the county of Bristol, have agreed to submit all accounts, claims and demands, which they now have against each other, of whatever name or nature, and whether founded in law or equity, to the determination and award of" [seven men named;] "all which claims they agree to make

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respectively, each against the other, before said referees, who shall consider the same with reference to equity and justice, as well as law, and the report of whom, or the major part of whom, being made in the presence of the parties, (in case they shall choose to be present, after due notice from the referees, for that purpose,) as soon as may be, shall be final therein. Benj. Rodman. Bethuel Penniman."

The bill also sets out the award, signed by all the arbitrators, who determined, "in full of all matters referred" to them, as follows: "*First*, that said Rodman shall convey, or cause to be conveyed, to the said Penniman, his heirs and assigns forever, by a good and sufficient deed of warranty, free and discharged from all incumbrances, a certain strip of land" [described]. "*Second*. The said Rodman shall also execute a good and sufficient deed of release to the said Penniman, his heirs and assigns forever, of all the right, title, interest and estate, which he now has by virtue of any deed or right whatever, as well as all the right, title, interest and estate, which he may have had to" a certain "lane or passage, 25 feet in width, on and subsequent to the 14th day of January, A. D. 1825, by virtue of a deed of that date from said Penniman, and shall warrant the same to said Penniman against all persons claiming from or under said Rodman. *Third*, that said Penniman shall convey to said Rodman, his heirs and assigns forever, by a good and sufficient deed of warranty, the one undivided half part of a certain building, used as a mill," [described,] "together with the undivided half part of the mill dam and mill pond attached to said mill, as well as all such rights and privileges as usually pertain to a mill. *Fourth*, that said Rodman shall pay or cause to be paid to said Penniman the sum of $485·40," "as a final balance upon all the accounts, claims, &c. submitted by said parties."

The bill avers that the plaintiff had tendered and offered to perform all things required to be done on his part, and had requested the defendant to perform the award on his part which he refused to do.

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The defendant demurs to the bill; and the first cause of demurrer is, that the court has no jurisdiction of the subject matter of the bill. But the question of jurisdiction, in this case, is not distinguishable from that of *Jones* v. *Boston Mill Corporation*, 4 Pick. 507, a case which was very well considered; and the decision seems to us to be well founded on principle and on the authorities. See 2 Story on Eq. § 1458. By the submission, the parties agree that the award of the arbitrators shall be final as to the matters submitted; which is virtually a contract between them, by which each party agrees to perform whatever the arbitrators shall lawfully direct to be done and performed by them respectively. *Wood* v. *Griffith*, 1 Swanst. 54. *Blundell* v. *Brettargh*, 17 Ves. 241.

The other ground of defence is, that the arbitrators had no authority to award and direct conveyances of real estate.

The bill alleges that, at the time of the submission, there was a controversy, or conflicting claims, between the parties, respecting real estate, and that these claims were laid before the arbitrators. It is clear, therefore, that the parties intended to submit their claims against each other, as to the real estate in controversy; and the words of the submission are sufficiently comprehensive to embrace these claims. The terms of the submission are general, and embrace all accounts, claims and demands which the parties had against each other at the time of the submission. That their claims concerning real as well as personal property were designated by these general terms is, we think, unquestionable, and that the arbitrators were thereby authorized to direct the conveyances mentioned in their award. It is not necessary that the arbitrators should be specially, and in terms, authorized to direct such conveyances, if the general terms are sufficient to show that the parties intended to give them such authority. So it was decided in *Sellick* v. *Addams*, 15 Johns. 197; and that decision is supported by the cases there cited. See also *Byers* v. *Van Deusen*, 5 Wend. 268. We think, therefore, there is no ground for saying that the arbitrators have

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exceeded their authority, so that the defendant is not bound to perform their award.

Demurrer overruled.

Eliot, in support of the demurrer.

O. Prescott, for the plaintiff.

MARCUS MORTON & another *vs.* SILAS DEAN.

A sale at auction is within the statute of frauds, and the auctioneer is the agent of the buyer and the seller, and his memorandum takes a case out of the statute, as well where lands as where chattels are sold: But his memorandum must refer to the conditions of sale, and must state the material terms of the agreement, or the case will be within the statute.

An auctioneer, on selling real estate to S. D. at auction, after reading or exhibiting written conditions of sale, made this memorandum in writing: "Sale, on account of Messrs. Morton and Dean, assignees of the Taunton Iron Company, of the real estate, nail works, water privilege, buildings and machinery, agreeable to the plans and schedule herewith. Sale to Silas Dean for $30,300. April 5, 1843." *Held*, that as this memorandum did not contain nor refer to the conditions of sale, it did not take the case out of the statute of frauds.

ASSUMPSIT. The plaintiffs' declaration alleged that they, as assignees of the Taunton Iron Company, exposed certain real estate for sale, on the 5th of April 1843, and that the same was struck off to the defendant, who was the highest bidder therefor, for the sum of $30,300; that they executed and tendered to the defendant a good and sufficient deed of said estate; that the defendant refused to receive the deed, and to pay for the estate, according to the terms of the sale; that the plaintiffs afterwards, on the 17th of May 1843, offered the same estate for sale at public auction, and that it was sold for a less sum than was bid therefor by the defendant, at the first auction.

At the trial in the court of common pleas, before *Cushing*, J. the plaintiffs gave in evidence the following memorandum, made by the auctioneer at the time of the sale to the defendant: "Sale, on account of Messrs. Morton and Dean,

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assignees of the Taunton Iron Company, of the real estate, nail works, water privilege, buildings and machinery, agreeable to the plan and schedule herewith. Sale to Silas Dean for $30,300. April 5, 1843." The plaintiffs also gave in evidence a deed of the estate sold, dated April 5th 1843, executed by them to the defendant, with evidence tending to show a tender of the same to him on the 27th of said April, and a refusal by him to receive it, and a second sale of said estate, by the plaintiffs, on the 17th of May 1843, for a sum less than $30,300. A plan of the estate was also given in evidence, and the court left it to the jury to decide whether it was the same plan that was exhibited by the auctioneer, at the time of the sale to the defendant.

It also appeared in evidence that written conditions of sale were exhibited or read by the auctioneer, at the time of said sale.

The defendant's counsel objected, that this action could not be maintained, for the following reason: "That the memorandum, offered and relied upon by the plaintiffs, is not such a memorandum as will bind the defendant, by taking the case out of the operation of the statute of frauds."

The court overruled this objection, and instructed the jury, that if they believed the plaintiffs' evidence, and were satisfied that there was no unfairness in the first or second sale, the plaintiffs were entitled to recover, and that the measure of damages was the difference between the defendant's bid and the sum for which the property was afterwards sold, with interest from the time of the tender of the deed to the defendant.

The jury returned a verdict for the plaintiffs for $5,300, and the defendant alleged exceptions.

Eddy, for the defendant. The statute of frauds (Rev. Sts. *c.* 74, § 1) is a defence to this action: "No action shall be brought upon any contract for the sale of lands, tenements or hereditaments, or of any interest in or concerning them, unless the promise, contract or agreement, upon which such action shall be brought, or some memorandum or note thereof,

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shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized."

Assuming that an auctioneer is the buyer's agent, with authority to sign the buyer's name, yet the memorandum should purport to be an auctioneer's paper, in order to give it effect against the buyer. The memorandum in this case does not purport to be made by an auctioneer.

Besides; the memorandum does not contain the terms or conditions of sale, nor make any reference to them. This defect is conclusive against the maintenance of the action. 2 Kent Com. (5th ed.) 511. *Hinde* v. *Whitehouse*, 7 East, 558. *Kenworthy* v. *Schofield*, 2 Barn. & Cres. 945. *Atwood* v. *Cobb*, 16 Pick. 230. *Clinan* v. *Cooke*, 1 Scho. & Lef. 22. *Blagden* v. *Bradbear*, 12 Ves. 471. *Grant* v. *Naylor*, 4 Cranch, 224. *Boydell* v. *Drummond*, 11 East, 142. *Powell* v. *Edmunds*, 12 East, 6. *Trustees of Baptist Church in Ithaca* v. *Bigelow*, 16 Wend. 28. *Jacob* v. *Kirk*, 2 M. & Rob. 221. *Freeport* v. *Bartol*, 3 Greenl. 340.

Is an auctioneer the agent of both parties, with authority to make a memorandum of the contract, and sign their names? Even in England, it is held that he is not, in all cases, and of course. *Bartlett* v. *Purnell*, 4 Adolph. & Ellis, 792. And judges in England have expressed their regret that the first case in which a factor or auctioneer was held to be such agent, was not overturned before any others were decided on it. See 2 Taunt. 45. 3 Ves. & Beames, 59. 1 Jac. & Walk. 351. Chief Justice Eyre, and Sir William Grant, and the court of common pleas, held that though an auctioneer was decided to be agent of both parties in the sale of chattels, yet that he was not such agent in a sale of land. *Stansfield* v. *Johnson*, 1 Esp. R. 101. *Buckmaster* v. *Harrop*, 7 Ves. 341. *Walker* v. *Constable*, 1 Bos. & Pul. 307. As this question has never been decided in this Commonwealth, the court can pause at the threshold, (to use Mr. Justice Dewey's language, in 9 Met. 488,) before they have embarrassed themselves by any unfortunate precedent of their own.

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Eliot & N. Morton, for the plaintiffs. This court has decided, conformably to the English decisions, that sales at auction are within the statute of frauds. *Davis* v. *Rowell*, 2 Pick. 64. And the decisions in the different States, as well as in England, have settled the doctrine, that an auctioneer is the agent of both parties, whether in the sale of goods or of real estate, and has authority to sign the promise, contract or agreement, or a memorandum or note thereof, for the party to be charged therewith. Story on Agency, § 27. 2 Kent Com. (5th ed.) 539. *Cleaves* v. *Foss*, and *Inhabitants of Alna* v. *Plummer*, 4 Greenl. 1, 258. *McComb* v. *Wright*, 4 Johns. Ch. 659, 666. *Bird* v. *Boulter*, 4 Barn. & Adolph. 443. *Gordon* v. *Sims*, 2 McCord Ch. 165. Chit. Con. (5th Amer. ed.) 304, 403. 1 Greenl. on Ev. § 269.

The memorandum, in this case, if it had been signed by the defendant, would have been sufficient to bind him; and a memorandum, when signed by the auctioneer, requires no additional particularity. See *Penniman* v. *Hartshorn*, 13 Mass. 91. *Egerton* v. *Mathews*, 6 East, 307. *Saunderson* v. *Jackson*, 2 Bos. & Pul. 238. *Hawkins* v. *Chace*, 19 Pick 502. *Batturs* v. *Sellers*, 5 Har. & J. 117. *Hicks* v. *Whitmore*, 12 Wend. 548. *Clason* v. *Bailey*, 14 Johns. 484. 1 Hovenden on Frauds, 195.

Coffin replied.

By the court. A sale at auction is within the statute of frauds, and the auctioneer, who makes the sale, is the agent of both parties, and his memorandum will take the case out of the statute, as well when lands as when chattels are sold. But the memorandum of sale must refer to the conditions of sale, or the case will be within the statute. Where the connexion between the memorandum and the conditions is to be proved entirely by parol evidence, it is within the mischief intended to be prevented by the statute. The terms of the agreement, which are material, must be stated in writing. As the memorandum, in this case, does not refer to the conditions of sale, the sale itself cannot be enforced. The authorities are conclusive on these points.

Verdict set aside.

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Noble Canedy *vs.* William Haskins.

A testator made the following devise in 1775: "I give to my brother W.'s son N., during his natural life, (after the decease of my wife,) and to his eldest male heir, and after his decease and to said male heirs and assigns forever, all and singular, my homestead," &c.: At the time of making the devise, N. had no issue; but he afterwards had several children, of whom the third son alone survived him. *Held*, that N. took a life estate only, and that, at his decease, his surviving son took an estate in tail male.

This was a writ of entry, and the case was submitted to the court upon the following statement of facts:

Barnabas Canedy, on the 31st of March 1775, being then seized of the demanded premises, and other lands and tenements, after giving to his wife the use and improvement of all his real estate during her life, devised, among other things, as follows: "Item. I give, grant and convey unto my brother William Canedy's son, Noble Canedy, during his natural life, (that is, after the decease of my said wife Elizabeth Canedy,) and at his decease to his eldest male heir, and after his decease and to said male heirs and assigns forever, all and singular, my homestead in Taunton and Middleborough, with all my houses, barns, out-houses and orchards on said lands, and part of a cedar swamp, known by the name of John Thrasher's cedar swamp, more or less. Likewise all the rights I own in the eleventh lot in Assonet cedar swamp, (provided he, the said Noble Canedy, pay the sums hereafter mentioned,) and one half of my wearing apparel." The will, in which the above devise was made, was proved and allowed on the 30th of July 1776; and the demanded premises are a part of the said John Thrasher's cedar swamp.

The demandant claims the demanded premises, as eldest male heir of Noble Canedy mentioned in said will, and it is agreed that he was the only male child that survived the said devisee, Noble Canedy. Said devisee went into possession of the estate devised to him, as aforesaid, after the death of said Elizabeth, (who survived the said Barnabas, the testator, and died a few years after his decease,) and continued to

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hold the demanded premises, until he conveyed the same, as hereinafter mentioned, and died in the year 1840.

Said Noble, the devisee, had seven children, who were all born after the decease of the testator. Two sons, the eldest born and the youngest, died in infancy. Three children survived him, viz. the demandant and two daughters of full age at his decease. Barnabas, the second son, (the demandant being the third,) died in 1815, of full age, but unmarried and without issue. Said Noble, the devisee, also left a grandson and great grandson, the legal representatives of a deceased daughter.

On the 25th of May 1810, said Noble, the devisee named in said will, by deed of that date, for a valuable consideration, and *bona fide*, attested by two credible witnesses, and duly acknowledged and recorded, conveyed the demanded premises to his said son Barnabas, and his son in law James P. Reed; both said grantees being then of full age. On the 15th of October 1810, the said Barnabas and James P., by their deed of that date, for a valuable consideration, and *bona fide*, and duly attested by two credible witnesses, and duly acknowledged and recorded, conveyed the same to the tenant.

It was agreed that if, on these facts, the court should be of opinion that the demandant is entitled to recover the demanded premises, the tenant should be defaulted, and judgment be entered for the demandant; otherwise, that the demandant should become nonsuit.

Eddy, for the demandant. No son of the devisee survived him, except the demandant. The eldest son died in infancy, and one older than the demandant lived to be of full age, but died 25 years before the devisee. As the devisee had no issue when the will was made, it is manifest that the testator, by the words "male heir," intended the eldest of the devisee's issue male, if any, who should be alive at the devisee's decease, and not any issue which should be born and die while he held the life estate. It is also clear that Noble Canedy, the express devisee for life, took an estate for life only; and there is no rule of law by which it can be changed into an

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estate in tail or in fee. Therefore the deed, which he made to his son Barnabas, and to his son in law Reed, conveyed an estate for his life only, and is no bar to the claim of the demandant. It is as clear that the demandant has an estate tail in the demanded premises, or an estate in fee, and that the remainder, as claimed by the demandant, is a good contingent remainder. See Fearne, 9, 340. *Archer's case*, 1 Co. 66, and 1 And. 37. *Ginger* v. *White*, and *Goodtitle* v. *Wodhull*, Willes, 348, 592. *Tyte* v. *Willis*, Cas. Temp. Talb. 1. *Doe* v. *Laming*, 2 Bur. 1100. Co. Lit. 8 *b*. Hargrave's note.

The rule in *Shelley's case*, 1 Co. 93 *b*. (though it was in force here when this will was made) does not apply to the present case. *First*. Because the limitation after Noble Canedy's decease is not to his heirs, either general or special, but to one of them, that is, the eldest male; and even if the plural word had been used, the rule would not have applied, if the testator did not use it in a legal sense. Cruise's Dig. tit. 38, *c*. 10, §§ 31–42. *Jones* v. *Morgan*, 1 Bro. C. C. 206. *Doe* v. *Laming*, 2 Bur. 1100. *Bagshaw* v. *Spencer*, 1 Ves. sen. 142, and Belt's note. *Sisson* v. *Seabury*, 1 Sumner, 251, 257, and cases there cited. *Second*. Because further words of limitation, superadded to the word "heir," indicate an intent to use the word in a restricted sense, as *designatio personæ*. 1 Co. 66. 2 Bur. 1110. *Richardson* v. *Wheatland*, 7 Met. 175. Now there are, in the case at bar, such words of limitation superadded to the devise to Noble's eldest male heir, viz. "to said male heirs and assigns for ever;" which is a sufficient indication of an intent that the eldest male heir should take by purchase, as a new stock of descent. *Bennett* v. *Morris*, 5 Rawle, 9. *Dunwoodie* v. *Reed*, 3 S. & R. 435. *Osborne* v. *Shrieve*, 3 Mason, 391. 1 Hargrave's Law Tracts, 575–577. 1 Preston on Estates, 369. 4 Kent Com. (5th ed.) 221. 7 Met. *ubi sup*.

Though there is a son of Noble Kennedy's daughter still living, yet there can be no pretence that he is the male heir contemplated by the devisor. He who takes the remainder must be both heir and heir male, and the son of a daughter

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who is heir shall not take. *Durdant* v. *Burchet*, Skin. 205.

W. Baylies, for the tenant. Noble Canedy, the devisee, took an estate tail, by force of that maxim of the common law, called the rule in *Shelley's case*, viz. that where an estate of freehold is limited to a person, and the same instrument contains a limitation, either mediate or immediate, to his heirs, or the heirs of his body, the word 'heirs' is a word of limitation; that is, the ancestor takes the whole estate comprised in this term. Thus, if the limitation be to the heirs of his body, he takes a fee tail; if to his heirs general, a fee simple. 2 Jarman on Wills, (1st Amer. ed.) 241 *b*. 4 Kent Com. (1st ed.) 206, 207. 1 Preston on Estates, 263. Though attempts have been made, from time to time, to break in upon this rule, yet it has been firmly established, by numerous decisions, as an axiom of the English law of real property, and was a part of the law of Massachusetts, at the time of the death of Barnabas Canedy, the testator, and for a long time after, and must govern this case, if the case be brought within it.

The devise is to Noble Canedy, during his natural life, and at his decease to his eldest male heir. The law supplies the words "of his body," if necessary to effectuate the intention of the testator. The words 'male heir,' or 'male heirs,' in a will, mean male heir or male heirs of the body. *Denn* v. *Slater*, 5 T. R. 335. 4 Dane Ab. 626. 1 Roberts on Wills, 538.

The circumstance on which much stress has been laid, by the demandant's counsel, viz. that the devise is to Noble Canedy, *expressly* during his natural life, cannot, of itself, have any influence to change or affect the character of the devise. He had a freehold estate, by the express terms of the will, and that is all which the rule in *Shelley's case* requires. *Coulson* v. *Coulson*, 2 Stra. 1125. *Robinson* v. *Robinson*, 1 Bur. 38. *Doe* v. *Cooper*, 1 East, 229. *Perrin* v. *Blake*, 4 Bur. 2579. *Doe* v. *Applin*, 4 T. R 82. *Dubber* v *Trollope*, 2 Preston on Estates, 538. In al these cases, there

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was no express limitation of the estate to the first taker for life; and in three of them there were negative words. Yet it was held that he took an estate tail, by force of the other terms of the devise. And an examination of all the decisions on this point will result in the conclusion so strongly stated in 2 Jarman on Wills, 246; namely, "that words, however positive and unequivocal, expressly negativing the continuance of the ancestor's estate beyond the period of its primary express limitation, will not exclude the rule."

The next question is, whether the words "eldest male heir" are words of limitation or of purchase. And if they are words of limitation, and not words of purchase, in their ordinary and technical import, the further question arises, whether they are made words of purchase by subsequent words of superaddition. These questions reach the essential and vital parts of the case.

The words "heir," "heir male," "heir of the body," notwithstanding the prefix "first," "next," or "eldest," are, in their proper technical import, words of limitation, and not of purchase, and are never to be taken as words of purchase, unless to answer the intent of the testator, so plainly and clearly expressed and manifested, that nobody can misunderstand it. This proposition is sustained by numerous decisions; but an extended citation of them is not necessary. In 2 Jarman on Wills, 233, 234, the law is thus stated: "It is clear that the words 'heir of the body' (in the singular) operate as words of limitation, and consequently confer an estate tail. Nor is the effect varied by the word 'next' or 'first' being prefixed to the word 'heir.'" Powell on Devises, (1st ed.) 361–363, is also very full on this point. These authorities, with those hereafter to be cited under this head, establish the following points: (1.) A devise to a man and his "first heir male," in the singular number, can have no other effect than a devise to a man and his "heir male," in the singular number. (2.) A devise to a man and his "heir male," will have the same effect as a devise to a man and his "heirs male." (3.) An express estate for life, devised,

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will be of as little consequence in the one case as in the other. *Dubber* v. *Trollope*, 2 Preston on Estates, 538. *Goodright* v. *Pullyn*, 2 Ld. Raym. 1437. *Burley's case*, cited by Lord Hale, in 1 Vent. 230. *Denn* v. *Slater*, 5 T. R. 337. Com. Dig. Estates by Devise, N. 5. 4 Dane Ab. 630. It is true that Lord Coke says, (Co. Lit. 8 *b.*) "if a man give land to a man and to his heir in the singular number, he hath but an estate for life; for his heir cannot take a fee simple by descent, because he is but one; and therefore, in that case, his heir shall take nothing." But Mr. Hargrave, in his note on this *dictum*, says, "according to many authorities, heir may be *nomen collectivum* as well in a deed as a will, and operate in both in the same manner as heirs in the plural number." And this opinion of Lord Coke seems to have but little foundation in the text of Littleton, as is shown by C. J. Eyre, in *Dubber* v. *Trollope*, 2 Preston on Estates, 542. But if this opinion or *dictum* were correct, it is not perceived how, taken all together, it could operate in favor of the present demandant.

It thus appears that the words of the devise "to Noble Canedy, during his natural life, and at his decease to his eldest male heir," in their proper technical import, conferred on Noble Canedy, the devisee in the will, an estate tail. Are the superadded words sufficient and powerful enough to convert these words of limitation into words of purchase, and cut down an estate tail to a life estate? To effect this change, it is necessary (as already stated) that the superadded words should show clearly, and beyond all doubt, that such was the intent of the testator. *Poole* v. *Poole*, 3 Bos. & Pul. 627. *Jesson* v. *Wright*, 2 Bligh, 1. 2 Jarman on Wills, 280, 305. This doctrine was recognized by Story, J. in *Sisson* v. *Seabury*, 1 Sumner, 257.

In commenting on a few of the cases cited for the demandant, it is to be kept in mind that the words 'child,' 'children,' 'son,' or 'sons,' are not equivalent to the word 'heir' or 'heirs.' They are not, according to their technical and legal import, *prima facie*, words of limitation, like the word 'heir' or 'heirs,' though they may be made so, by plain and

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unequivocal evidence. This distinguishes the present case from that of *Sisson* v. *Seabury*, and from several other cases cited on the other side.

The case of *Doe* v. *Laming*, 2 Bur. 1110, is examined by Mr. Jarman, who concludes his comment by saying, "we may then reasonably hope never to hear that case again cited as an authority in a court of law." 2 Jarman on Wills, 288. Yet this is the case which Story, J. refers to, in emphatic terms, as fully sustaining his decision in the case of *Sisson* v. *Seabury*.

The judgment of the court of King's Bench, in *Perrin* v. *Blake*, 4 Bur. 2579, was reversed in the Exchequer Chamber. Lord Brougham, in speaking of the decision of the King's Bench, in that case, says, "that it was erroneous, no lawyer can doubt."

Archer's case, 1 Co. 66, contains the strength and substance of most of the cases cited for the demandant. It is, in fact, a compendium of the material points upon which the demandant's case is put. In that case, there was a devise to the father for life, and after to his next heir male, and to the heirs male of the body of such next heir male; and it was agreed by the court that this was a contingent remainder to the heir, and that the father was but tenant for life; and he having made a feoffment of the devised land, it was held that such contingent remainder was destroyed. The true ground of this decision seems to be, that the superadded words, or subsequent limitation, "to the heirs male of such heir male" (confining the succession to the next heir male and his line exclusively) necessarily implied that the testator used the words "next heir male" as words of purchase, and not of limitation. And so far, it may be that *Archer's case* is an authority in a case under similar circumstances. But the words of superaddition, in the devise to Noble Canedy, are very different, viz. "and after his decease and to said male heirs and assigns forever." Do these words, "after his decease," refer to "his eldest male heir," or are they tautological

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— a mere repetition — and so refer to Noble Canedy? And whose heirs are "said male heirs"? The word "heirs" had not been used before. The words are not to the heirs male of the body of said eldest male heir, nor to *his* male heirs. And it will require an unreasonable latitude to give the words of this testator the same construction which the words in *Archer's case* received. If these words, "said male heirs" have reference to the words "said male heir," the reference was made to them, by the testator, as *nomen collectivum;* he having used them as such, and meaning no more, by the words "eldest male heir," and "said male heirs," than to point out the order of succession which the law itself had prescribed, and not intending to restrain and limit the devise to his eldest son and *his* male heirs. And to infer such intent from obscure and ambiguous words, and phrases of uncertain and doubtful meaning, by conjecture and guessing, would be to set aside a rule of law, which requires that such intent, in order to avail, shall be clearly intelligible and unequivocal; otherwise, that the superadded words shall be rejected.

That there were two life estates, as suggested by the demandant's counsel, is a circumstance that can have no influence in the construction of the devise. No life estate intervened between Noble Canedy's freehold, and the subsequent limitation; and though the widow might have survived him, yet she did not. If she had, it would have made no difference.

If Noble Canedy took an estate tail, the entail has been barred by the deeds in the case, and a complete title has vested in the tenant. This is not denied by the demandant's counsel.

It may be further suggested for the tenant, that the deeds contain the usual covenants of warranty; and that if Noble Canedy was but a tenant for life, still, upon the authority of *Archer's case*, (if all the resolutions in that case can be applied to this,) the remainder was destroyed; or if the ancestor's warranty was binding upon the demandant, then, upon

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the principle of collateral warranty, or presumed assets, the demandant's title would be defeated; the covenant of warranty operating as a bar. 4 Dane Ab. 320.

Barnabas Canedy, one of the grantors in the deeds, was, at the time of their execution, the eldest son, then living, of Noble Canedy, and his heir apparent. The first born son, however, of Noble Canedy, was the Barnabas Canedy who died in infancy; and if the words "heir" or "heirs" are to be taken as words of purchase, synonymously with "son," "sons," "child," and "children," then these questions may be suggested: At what time did the estate vest in the first born son, or in the eldest son living at the death of the tenant for life? In him who first came within and answered the description, or in him who answered it at the death of the tenant for life? If it vested in the first Barnabas, then did not the demandant take in common with others?

Greenleaf, in reply. This case turns, as the tenant's counsel has said, upon the question, whether the words, "eldest male heir," in the will under discussion, are to be interpreted as words of limitation or words of purchase. As the testator's intent is to govern, the question is purely one of interpretation.

The rule in *Shelley's case* has always been considered as of more absolute control in its application to deeds than to wills. 4 Kent Com. (5th ed.) 216. In wills, too, the language is to receive its plain and popular exposition, except where the technical phraseology of the law is employed; in which case only is the strict legal sense to be adopted.

The defence rests not only on a stern application of the rule in *Shelley's case*, but on pressing that rule beyond its just limits. The original reasons for that rule never existed in this country. And in England, courts of equity have not held themselves bound by it in regard to equitable estates, though limited in the very words of the rule; and the courts of law there have adhered to it, as a rule of property, applicable only to cases literally within it. It is now abrogated by statute, both in England and in Massachusetts, as well as

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in many other States of the Union. Surely this court will not feel bound to give it *now* a very extended application. Even before the rule was abrogated in England, it was not held to apply, unless the estate was limited to the same persons, and in the same manner, as it would have gone by descent, if a fee had been expressly given to the first taker. Nor was it applied to cases where the testator annexed words of explanation to the word "heirs," or superadded words, either of explanation or of fresh limitation, grafting a new estate of inheritance upon the heirs to whom he gave the estate. 6 Cruise's Dig. (White's ed.) 291, 295. But, in the present case, the estate is not given to the same persons; and words of explanation and of fresh limitation are superadded.

The testator first gives a life estate to his wife. Then he gives a life estate, by express limitation, to Noble Canedy. "At his decease," it is expressly limited "to his eldest male heir." At whose decease, and to whose male heir? Clearly, Noble Canedy's. This "male heir" was a person in contingency, namely, the person who might happen to answer the description, at the death of Noble Canedy.

Then the testator proceeds to direct, that "at his decease" the estate shall go over. At whose decease? As clearly as before, after the decease of this person whom he had just designated as the eldest male heir. That it was a particular individual whom he meant, is apparent, *first*, from the use of the singular number "heir;" *secondly*, from the word "eldest," which can apply to but one person; *thirdly*, from the word "male;" and *fourthly*, from the subsequent relative "his," in the singular number, referring back to this person as the last antecedent. The first three of these reasons apply with peculiar force in this country; because real estates here descend to all the persons related in the same degree, and to females as well as males; rejecting the common law rule of primogeniture and of preference of males to females. On this account, many of the English cases, in which the rule in *Shelley's case* is applied, have no application here, as they are founded on a totally different law of descent.

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Then follow the testator's words of final superadded limitation, "and to said male heirs and assigns for ever." This is obscurely expressed; but thus much is clear, to wit, that it is a *superadded* limitation. For no limitation in fee precedes it; and it is a limitation in fee. But whether in fee simple or in fee tail, is a question not now before the court; nor is it material to the decision of the present case.

The demandant's interpretation of the devise retains every word, and gives to each its natural and ordinary meaning and force. And such is the course adopted by the courts. They never reject words which have an intelligible meaning, and are neither absurd, nor repugnant to the clear legal intent of the rest of the will. Now the words "after his decease" are intelligible, and not absurd, nor repugnant to any other clearly expressed intent in the will. Allowing them, therefore, their natural meaning and force, and giving the relative its plain grammatical reference, it seems plain that the "eldest male heir" is a designated individual, and not *nomen collectivum.*

The counsel for the tenant was aware that if the words "after his decease" are retained, and taken into the interpretation, the tenant's case is gone. He therefore contended that they should be rejected as surplusage. But this would be doing violence to the will, and in fact making a new one for the testator. These words are plain and sensible, and express nothing contrary to any rule or provision of law, nor to any intention of the testator elsewhere expressed.

Upon authority also, the case is equally clear for the demandant. *Archer's case*, 1 Co. 66, is in substance the same as this; the substance being, that where an estate is limited to one for life, remainder to his next heir male, in the singular number, and to his heirs, (meaning the heirs of the next heir male,) the first taker has but an estate for life. To the same effect is *Luddington* v. *Kime*, 1 Lord Raym. 203, and *Sisson* v. *Seabury*, 1 Sumner, 235.

The case of *Doe* v. *Laming*, 2 Bur. 1100, before cited, is so decisive of the present case, that its force is attempted to be parried by the opinion of Mr. Jarman that it ought not any

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longer to be cited. That it conflicted with his views is certain. But it is equally certain that it did not conflict with the views of other jurists at least equally respected. His opinion was first given to the public, in 1827, in his edition of Powell on Devises. But the case of *Doe* v. *Laming* was cited and relied on, in 1820, in *Jesson* v. *Wright*, 2 Bligh, 1; and it was neither contradicted by that case, nor was its soundness questioned by the judges, though they did consider and overrule *Doe* v. *Goff*, 11 East, 668, which stood in the way of their decision. And in 1825, Bayley, J. judicially recognized *Doe* v. *Laming* as good law, in *Doe* v. *Harvey*, 4 Barn. & Cres. 610. It is also found as good text law, in 6 Cruise's Dig. (White's ed.) 272, 293, published in 1835, eight years after it had been questioned by Mr. Jarman. Again, in 1843, in *Greenwood* v. *Rothwell*, 5 Man. & Grang. 628, the case of *Doe* v. *Laming* was cited as good law by Serjeant Byles, and the decision of the court was in accordance with that case. It is also cited as sound law, in 4 Dane Ab. 633, and was so held by Story, J. in *Sisson* v. *Seabury*, and by this court, in *Adams* v. *Cruft*, 14 Pick. 22. To deny its authority now would unsettle the law of real property, without necessity; and this, too, for the purpose of giving effect to a rule now obsolete, and at variance with the policy of our institutions.

Wilde, J. In this writ of entry, both parties claim title under the will of Barnabas Canedy; so that the case depends on the construction of his will, by which he devised the demanded premises and other lands and tenements, in the manner following: "I give, grant and convey unto my brother William Canedy's son, Noble Canedy, during his natural life, (that is, after the decease of my said wife Elizabeth Canedy) and at his decease to his eldest male heir, and after his decease and to said male heirs and assigns forever, all and singular my homestead farm in Taunton," and also the demanded premises.

The cause has been ably argued, and numerous cases have been cited and discussed by counsel, as to the rules of

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construction in like cases, some of which are apparently conflicting, but which, we think, may be reconciled, so far at least as they bear on the present case, by the application of the general rule that, in the construction of wills, the intention of the testator is to govern, if it may be effectuated by the rules of law.

On the part of the demandant, it has been argued, that by the devise Noble Canedy took an estate for life, and that a contingent remainder in fee was given to his eldest male heir, which vested in the demandant, on the decease of the said Noble, his father; he being then his only male heir. The leading authority in support of this construction is *Archer's case*, 1 Co. 66 *b*. That was a devise to Robert Archer for life, and to his next heir male, and the heirs male of the body of such heir male, and it was held that Robert Archer took only an estate for life. Numerous subsequent cases, in support of the same construction, are cited and reviewed by Story, J. in *Sisson* v. *Seabury*, 1 Sumner, 235.

On the other hand, it was contended by the tenant's counsel, that Noble Canedy, the devisee named in the will, took an estate in tail male, according to the rule, in *Shelley's case*, 1 Co. 93 *b*, that where an estate of freehold is limited to a devisee or grantee, and by the devise or conveyance an estate is limited, either mediately or immediately, to his heirs, in fee simple or in tail, "his heirs" are words of limitation of the estate, and not words of purchase. Numerous cases and authorities have been cited in support of the application of this rule, as the counsel for the tenant contends, to the present case. One of the strongest cases in support of the argument for the tenant is that of *Robinson* v. *Robinson*, 1 Bur. 38. In that case, the devise was as follows: "I bequeath all my real estate to Lancelot Hicks, for and during his natural life, and no longer; and after his decease to such son as he shall have: and for default of such issue, then I give the same to my cousin," &c. It was held that although the devise to Hicks was of an estate for life, and no longer, yet by necessary implication, to effectuate the manifest general intent of

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the testator, the will was to be so construed as to give to Hicks an estate in tail male; because the father could not take an estate for life, and the sons successively an estate in tail; as an estate to the heirs male of the body of L. Hicks is implied, though an estate for life only is given to him. Several cases were decided by Lord Kenyon, on the same ground, namely, on the rule of construction, that where a particular intent is indicated, which is inconsistent with the general intent of the will, the former must yield to the latter. See 2 Jarman on Wills, 318, 319. I do not, however, intend to review the numerous cases cited, which would be a useless labor. For the present case must depend on the intention of the testator, if not inconsistent with the rules of law. And that intention must be ascertained by the language of the will; taking into consideration all its provisions bearing on the question. Little assistance can be obtained by consulting a multitude of cases.

Now we have no doubt as to the intention of the testator, in the present case. In the first place, it is clear that he intended to give Noble Canedy, the devisee named in the will, a life estate, for this intention is expressly declared. In the next place, he gives the estate, at his decease, to his "eldest male heir;" and the question is, whether the testator intended, by these words, to enlarge the estate given to Noble Canedy, and thereby to create an estate tail in him, or were the words intended to indicate the person who was to take the estate at the decease of the first devisee? And we think the latter intention is manifestly indicated. By "the eldest heir," we think the eldest son of the devisee named in the will, who should be living at the decease of the devisee, was intended; for we cannot suppose that any collateral relative of the devisee was intended. The devisee had, at the time of the devise, no children; but the remainder was not to vest until the death of the devisee of the life estate; and the devise over may reasonably be construed as a prospective provision for his eldest son, who should be living at his decease. In this respect, the devise materially differs from that in

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Wild's case, 6 Co. 16 *b*. In that case, it was decided, that if A. devises his lands to B. and to his children or issue, and he hath no issue at the time of the devise, the same is an estate tail; for the gift is immediate, and the children or issue could not take, not being *in rerum natura;* and they could not take by way of remainder, for that was not the intent of the testator — the gift being immediate. In the present devise, the gift to the eldest heir of the first devisee was to take effect, and we think did take effect, by way of remainder, which was contingent and did not vest until the death of the devisee, Noble Canedy; and we are of opinion that the demandant took an estate in tail male. It is true that the intention of the testator is not accurately expressed; but we think there can be no reasonable doubt of the meaning. It is clear that the eldest son or heir of Noble Canedy was to take a remainder. Then follow the words, "and, after his decease, to said male heirs and assigns forever." We think that by these words the intention is indicated, that after the decease of the eldest son of Noble Canedy, the estate given to him was to descend to his eldest son, and so from eldest son to eldest son, in perpetual succession. The words "said male heirs" were intended to designate the eldest male heirs who should take in succession after the death of the first remainderman. These words, therefore, must be construed as words of limitation of the estate in remainder, and not as enlarging the life estate expressly given to Noble Canedy; and thus all the parts of the will will be consistent. The rule in *Shelley's case*, accordingly, does not apply to the estate of Noble Canedy, the devisee first named in the will, and he only took an estate for life.

The rule of construction, on this point, is correctly stated by Jarman, and is fully supported by the authorities. "Though a devise to the next heir male, simply following a devise to the ancestor for life, does not confer on the heir an estate by purchase, (the words being construed as words of limitation,) yet if the testator has ingrafted words of limitation on the devise to the next heir male, he is considered

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as indicating an intention to use the term 'heir' as a mere *descriptio personæ;* the superadded words of limitation having the effect of converting the expression 'next heir male' into words of purchase." 2 Jarman on Wills, 234. This we consider a very sound rule of construction, and it is decisive in the present case. No one would doubt, that if the devise had been to Noble Canedy for life, and at his decease to his eldest son, and the heirs of his body, the latter would take an estate tail; and we think the words in the will, though not expressed with perfect accuracy, must have the same effect. *Tenant defaulted.*

Samuel Wilbur *vs.* Albinus Wilbur.

A tenant in common of land, who makes an agreement with the wife of his cotenant, that the cotenant shall have the sole occupation of the land, and pay him a certain sum therefor, cannot maintain an action for such occupation, if he does not prove that the cotenant had actual knowledge of such agreement, or that he authorised his wife to make it.

Assumpsit for the use and occupation of land owned in common by the defendant and the plaintiff, and alleged to have been hired of the plaintiff by the defendant. To prove such hiring, the plaintiff, at the trial in the court of common pleas, before *Colby*, J. offered to show that the wife of the defendant called upon the plaintiff and agreed with him that the defendant should have the sole occupation of the land, and should pay the plaintiff a certain sum therefor, and that the defendant did afterwards so occupy the land. But the judge ruled that "evidence of a hiring by the defendant's wife was not admissible, unless knowledge of such hiring was brought home to the defendant, or authority from him was shown." A verdict was thereupon taken for the defendant, and the plaintiff alleged exceptions to the said ruling.

Eliot, for the plaintiff.

Coffin, for the defendant.

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Shaw, C. J. The defendant and the plaintiff being tenants in common, it was not contended, at the bar, that the defendant would be liable to assumpsit for use and occupation, on an implied promise, from his sole and several occupation. Some express promise, made by him or by his authority, was necessary.

We think the judge was right in ruling that the wife had no authority, implied from the relation of husband and wife, to make a contract in his behalf. If the husband knew of such express agreement by the wife, and continued to occupy solely, without notice or objection, this and other circumstances might have been left to the jury to infer the husband's assent, which would amount to a ratification. But no such evidence was offered. *Exceptions overruled.*

Samuel Wilbur *vs.* Albinus Wilbur.

In an action of trespass *quare clausum fregit*, the plaintiff, to prove his title to the close described in his declaration, offered in evidence an office copy of the levy of an execution thereon: The defendant thereupon produced the original levy, as returned on the execution, in which were material alterations and interlineations, affecting the boundaries of the land set off, and objected to the admission of the copy in evidence, until the plaintiff should explain and account for said alterations. *Held*, that the copy was admissible, and that the burden of explaining and accounting for the alterations was not on the plaintiff.

Trespass for breaking and entering the plaintiff's close. At the trial in the court of common pleas, before *Colby*, J. the plaintiff, to prove his title to the close alleged to have been broken and entered by the defendant, offered, among other evidence, an office copy of a levy of an execution, issued on a judgment recovered by him, upon certain real estate, including the said close. Upon the defendant's producing the original levy, certain material alterations and interlineations appeared upon its face, which affected the extent of the lot of land set off upon the execution, and on which the alleged trespass by the defendant was committed. The

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introduction of said copy, in proof of said levy, was objected to by the defendant, until the plaintiff, who relied upon the title conferred by the levy, should explain and account for the said alterations and interlineations in the original. The plaintiff did not offer to explain them; and the judge ruled that the burden of proof was on the plaintiff to explain said alterations. Thereupon the plaintiff became nonsuit, and filed exceptions to said ruling.

Eliot, for the plaintiff. The record copy, which was offered in evidence, was correct. It was the original only, which contained erasures and interlineations. The ruling might have been right, if the paper had been one of which the plaintiff had the control. But in the case of an execution, which is in the control of the officer who makes the levy, until it is registered, and which, after it is returned, is a judicial record, the burden of proof is not on the party who relies on the levy. See *Jackson* v. *Osborn*, 2 Wend. 555. *Jackson* v. *Jacoby*, 9 Cow. 125. *Bates* v. *Willard*, 10 Met. 81. *Nason* v. *Dillingham*, and *Bucknam* v. *Ruggles*, 15 Mass. 170, 180. *Lawrence* v. *Pond*, and *Bean* v. *Parker*, 17 Mass. 433, 601. *Bott* v. *Burnell*, 11 Mass. 165.

Coffin, for the defendant. He who relies on an instrument must remove the doubt which arises from suspicious appearances on its face. 1 Greenl. on Ev. § 564. *Ross* v. *Gould*, 5 Greenl. 204. And this is as true of a public document as of a private one.

Dewey, J. The ruling of the presiding judge was, as it seems to us, incorrect. It was no part of the duty of the plaintiff to produce the original papers or the clerk's files, to establish his levy. Certified copies of records of the courts, and of papers officially returned to the office of the clerk, are competent evidence for that purpose. Such copies might be controlled by any competent evidence that the paper on file was a forgery, or, in a case like that of an execution having a levy of real estate indorsed thereon, it would be open to show some fraudulent alteration of the same by the interpolation of words, or by erasures. But when the document is

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under the hand of an officer, and by him duly certified, it is to be taken to be the true return, as it is apparently there written; and the mere fact that erasures have been made, and words added, after the first writing of the description of the lands taken, furnishes no presumption of a fraudulent alteration, but is rather to be taken to be a correction, by the officer, amending his return according to the truth. In such case, the burden of proof is on the party alleging the fraudulent alteration. We see nothing, in this case, which required the plaintiff to go forward and explain and account for the alleged alterations. It was a seasonable discharge of his duty to do so after the alterations had been shown to have been made subsequently to the return of the officer. A *prima facie* case of fraudulent alteration, at least, should have been shown, before the plaintiff could be called upon to explain and account for the alleged alterations in an official return. *New trial ordered*

STEPHEN S. SHERMAN *vs.* THOMAS BRAMAN.

B. took up beasts doing damage on his land, and impounded them in his own enclosure for several hours, and then drove them towards the town pound, and delivered them, in the highway near the pound, to the pound keeper, (who was also a field driver,) as cattle taken doing damage, but did not leave with the pound keeper a written memorandum, as required by the Rev. Sts. *c.* 113, § 6, stating the cause of impounding and the sum that he demanded for the damage done: The pound keeper put the beasts into the pound, and gave the owner the notice required to be given by field drivers when they impound beasts taken up for going at large contrary to law. *Held*, that B. became a trespasser *ab initio*, by failing to leave with the pound keeper the written memorandum required by law, and was answerable to the owner of the beasts in an action of trespass for taking, driving away and detaining them.

TRESPASS for taking, driving away and detaining the plaintiff's cattle. At the trial in the court of common pleas, before *Colby*, J. it appeared that the plaintiff and defendant resided in Norton, about a mile from each other, and that, on the night of the 21st of August 1845, the plaintiff's cattle were put

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into his barn yard, and that the bars of the yard were put up; that the cattle, very early in the morning of the next day, were in the highway, near the house and adjoining the land of the defendant, and that the defendant impounded them in his field or enclosure, claiming to have taken them for doing damage to his apple trees, (the limbs of which extended over the highway,) eating his apples, and throwing down his fences. Evidence was submitted to the jury, which tended to show that the cattle, while in the highway, damaged some of the branches of said trees, and ate the apples thereon.

The plaintiff requested the court to instruct the jury, that the defendant, not being a field driver, had no right to take up and impound the cattle, being upon the highway, although they, while in the highway, damaged his trees which overhung it. But the court instructed the jury, that if the cattle, while in the highway, did any damage, however slight, to the plaintiff's trees, he might lawfully impound them as taken doing damage on his premises.

It also appeared that within an hour or two after the cattle were thus impounded by the defendant, in his close, the plaintiff came in pursuit of them, and learned that they were thus impounded; and that there was then a conversation between the plaintiff and defendant concerning the cattle; and that the cattle remained in the defendant's custody, where they were first impounded, until four or five o'clock in the afternoon of the same day, when the defendant drove them towards the town pound in Norton, which was four miles from the residence of both parties and from the place where the cattle were first impounded, and there delivered them to the pound keeper, (who was also a field driver,) as cattle taken by the plaintiff doing him damage.

The pound keeper testified that he received the cattle in the highway near the pound, in his capacity of field driver, and then impounded them, and proceeded to give the notice required to be given by a field driver; and that he kept the cattle impounded in the town pound for several days, but finally delivered them to the plaintiff.

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It did not appear that the defendant left with the pound keeper any memorandum in writing, stating the cause of impounding or the damages claimed. The pound keeper testified that when the defendant delivered the cattle to him, he wrote a paper and left it with him, and took it away on the next day. But there was no evidence as to the contents of said paper.

The court instructed the jury, that if the plaintiff's cattle were in the highway, doing any damage to the defendant's trees which overhung it, and he impounded them in his enclosure in the morning, the plaintiff knowing that they were there impounded, and if, in the afternoon, the defendant drove them to the town pound, a distance of four miles, it not appearing whether there was any other town pound in Norton, and there delivered them to the field driver, as cattle taken doing him damage, he had a right to do so, and was not bound to do any further act, unless he claimed damages; and that, if he waived his damages, or claimed none, when the cattle were delivered to the field driver, he was not bound to leave any memorandum in writing, or to cause notice to be given to the plaintiff.

The jury found a verdict for the defendant, and the plaintiff alleged exceptions to the aforesaid instructions.

Pratt, for the plaintiff.

Coffin & Daggett, for the defendant.

Shaw, C. J. In trespass for taking and driving away the plaintiff's cattle, the defendant justifies, on the ground that he found the cattle doing damage to his land, and that he took them up and impounded them, as he lawfully might do.

In considering this difficult subject of the impounding of cattle, it is necessary to keep in mind the two distinct classes of cases provided for by the statutes. The first is that of cattle unlawfully at large on the highways or commons, where the object is, to prevent a nuisance and punish the negligent owner. The other is, where cattle are found doing damage to the land of another, and where the party injured has a right to impound them, as a means of redress for his

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particular injury. The course of proceeding in the two classes is, in many respects, distinct and peculiar, adapted to accomplish the different objects for which it is resorted to.

A verdict having been found for the defendant, in the present case, under the directions given by the court, exceptions were taken to several of those directions; but it may not be necessary to consider all of them.

Suppose the defendant had a right to take up the cattle, as cattle doing damage to his land, although they did not pass from the highway into his enclosure, (of which, as the facts are not particularly stated, we give no opinion,) the ground mainly relied upon by the plaintiff is, that the defendant, having taken up the cattle, did not conform to the requirements of the statute, in impounding them. The evidence tended to show that the defendant, in the first instance, imprisoned the cattle in his own field or enclosure, of which the owner of the cattle, (the plaintiff,) in a short time, had notice; having come in search of them, and found them thus imprisoned by the defendant. In the afternoon of the same day, the defendant drove the cattle towards the town pound, and delivered them, near the pound, to a person who was at the same time a field driver and pound keeper; and he impounded them as cattle going at large in the highway. The defendant left no memorandum with the pound keeper, stating that he had taken the cattle up and detained them because they were doing damage to his land, or stating the amount of his claim for damages.

We may lay out of our consideration the statute provisions, directing the proceedings where beasts are distrained and taken up for going at large in the highways, contrary to law. The defendant did not claim to take them for that cause, nor justify on that ground, but because they were doing damage to his land.

When a person is injured in his land, by cattle, the statutes provide, as one among other modes, that he may recover his damages by distraining the beasts doing the damage, and by proceeding in the manner therein directed Rev. Sts. c. 113,

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§ 4. Such beasts, by § 5, may be impounded, either in the town pound, or in some suitable place under the immediate care and inspection of the person distraining them. But having elected one of these modes, he cannot, we think, afterwards abandon it and pursue the other; because the course of proceeding is different, and the two are inconsistent with each other. In case of impounding in the town pound, "the distrainer shall leave with the pound keeper a memorandum in writing, under his hand, stating the cause of impounding, and the sum that he demands from the owner, for the damage done by the beasts," and for charges; and if he impounds them in any other place, he is to give a like memorandum to the owner of the beasts, if demanded by him; the same to be given within twenty four hours. Rev. Sts. c. 113, §§ 6, 8. The course of proceeding, on the part of the owner of the beasts, is different in the two cases. In the one, he is to apply to the distrainer and make certain payments to him. In the other, he is to apply to the pound keeper, and make certain payments to him.

But if this were doubtful, and if, after impounding the cattle first in his own enclosure, the distrainer might afterwards transfer them to the town pound, he would be subject to the same duties, and must comply with the same requirements of law, as if he had originally impounded them in the town pound. But he did not, in the present case, comply with the indispensable duty of leaving with the pound keeper a memorandum, under his hand. This document is the pound keeper's only warrant for detaining the cattle and demanding his fees, and is indispensable to his justification and security. Without it, he himself would be a trespasser.

But, suppose the evidence would warrant the conclusion, that when the defendant drove the cattle towards the town pound, and being in the highway, the pound keeper, who was also a field driver, took them, as being at large contrary to law, and that there was a new taking, from and after which the defendant was exempted from all further responsibility for them, or duty respecting them. It is difficult to adopt

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this hypothesis; because it is stated that the defendant delivered the cattle to the field driver near the pound, and then and there they were not at large contrary to law. But if the evidence would sustain this hypothesis, we do not perceive how it would aid the defendant in his defence of this action. How would the case then stand? It would appear that the defendant took up the cattle, in the morning, damage feasant, and impounded them, as he might, on his own premises. If he did not give notice to the owner, he failed to comply with the law. If he did give notice, it must have been notice that the cattle were impounded on his own premises, and that, upon paying the damage, the owner might there have them. But, instead of detaining them there, for that purpose, he drove them several miles, under pretence of impounding them, but did not impound them. On the contrary, he left them in the highway, where it was unlawful for them to be, by which they were liable to be taken up, and the owner was exposed to the loss of the cattle, or to heavy penalties and costs. This, then, is no justification to the defendant for the taking in the morning, whether the pound keeper did right or wrong in his taking or treatment of the cattle afterwards.

The court directed the jury, among other things, that if the defendant delivered the cattle to the field driver, who was pound keeper, as cattle taken doing him damage, he had a right to do so, and was not bound to do any further act, unless he claimed damages; that if he waived his damages, or claimed no damages, when the cattle were delivered to the field driver, he was not bound to leave any memorandum in writing, or cause notice to be given to the plaintiff. We think these directions were not correct in point of law. We cannot perceive that it makes any difference, that the pound keeper was also a field driver. The defendant's justification is, that he carried the cattle to the town pound and delivered hem to the pound keeper. The memorandum, which the statute requires to be given to the pound keeper, is not only o give notice of the distrainer's claim for damages, and its

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amount, but also the cause of taking. He must also give notice, to the party, of the time, place and cause of impounding. We think, therefore, the verdict must be set aside, and a new trial ordered.

The defendant, having, in the first instance, acted under an authority vested in him by law, and afterwards abused it, or failed to comply with the terms and conditions on which it was granted, must be deemed a trespasser *ab initio*.

GEORGE W. SHORES *vs.* ANDREW CASWELL & another.

An attorney has no authority, by virtue merely of his retainer to prosecute or defend a suit, to release a claim of his client on a third person, for the purpose of making such person a competent witness for his client.

SCIRE FACIAS against the bail taken by Elias A. Morse, a deputy sheriff, in an action brought by the plaintiff against Warren Billings. At the trial before *Hubbard*, J. the plaintiff, to prove the execution of the bail bond by Billings, the principal, offered the said Morse as a witness. On his being objected to as incompetent, by reason of his interest in the event of the suit, a release, executed by the plaintiff's attorney of record in this suit, was produced and delivered to Morse. The defendants objected, that the plaintiff's attorney of record was not, as such, authorized to execute the release to the witness. But the objection was overruled, and Morse was admitted as a witness. A verdict was found for the plaintiff, and the defendants alleged exceptions.

Clifford, for the defendants.

Coffin, for the plaintiff.

SHAW, C. J. This was an attempt to carry the authority of an attorney beyond its just limits. We speak of the authority of an attorney, arising from his relation, as such, without other powers expressly conferred. Undoubtedly an attorney, retained to prosecute or defend a suit, has authority, as incidental to his retainer, to take all legal steps, and do every

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legal act, in behalf of his client, to the legal end and determination of such suit. He may appeal; *Adams* v. *Robinson*, 1 Pick. 461; or refer a case to arbitrators; *Buckland* v. *Conway*, 16 Mass. 396. He may receive livery of seizin; *Pratt* v. *Putnam*, 13 Mass. 361; and he may sue out a writ of *scire facias* against bail; *Dearborn* v. *Dearborn*, 15 Mass. 316; or a writ of error; *Grosvenor* v. *Danforth*, 16 Mass. 74. All these, however, are powers incidental to the conduct and prosecution of a suit or defence to its legitimate result. But the attorney can no further deal with the rights of his client, when legally established, without special authority. He may collect an execution, if his authority in that respect is not revoked, because it is incident to his authority; but he cannot release it without payment, nor take part for the whole. *Lewis* v. *Gamage*, 1 Pick. 347.

Here, the attorney, in prosecuting this suit, had occasion for the testimony of a witness who could be made competent by a release of another cause of action; and he, by virtue of his office, without authority, executed such a release. This was dealing with another and independent right of his client, not committed to his charge, and not incident to his retainer. *Marshall* v. *Nagel*, 1 Bailey, 308. It might be that the cause of action released was of much more value than the cause of action in question in this suit; and it was for the client, and not for the attorney, to judge of that, and determine whether to execute the release or not.

Verdict set aside, and a new trial ordered.

INHABITANTS OF RAYNHAM *vs.* SARAH L. WILMARTH.

A judge of probate has no authority, under the Rev. Sts. *c.* 60, § 3, to assign dower to a widow in lands mortgaged by her husband.

A writ of entry to foreclose a mortgage may be maintained, and a conditional judgment rendered, against a widow who is in possession of mortgaged lands, assigned to her as dower by a judge of probate, though the judge had no authority to assign dower to her.

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This was a writ of entry to foreclose a mortgage of land and buildings in Taunton. The action was commenced in the court of common pleas, and was submitted to that court upon the following statement of facts:

The mortgage deed declared on, dated December 8th 1840, was duly executed and acknowledged by Dan Wilmarth, and the condition thereof was broken before this action was instituted. The demanded premises are a part of the property conveyed to the demandants by said deed. The said Dan Wilmarth died in 1841, in possession of said mortgaged premises. Said Sarah L. Wilmarth, (the tenant,) at the time of the making of said mortgage, and before, was the wife of said Dan, and never released her claim to dower in said premises. The portion of said mortgaged premises, which is demanded in this suit, was assigned and set out to her as dower in the estate of said Dan, by the judge of probate for the county of Bristol, in the mode provided by the Rev. Sts. c. 60, § 3, and said assignment was accepted by said judge, on the 9th of June 1843, and was duly recorded; and the said Sarah L. has ever since occupied said premises, so set out to her as and for her dower.

On these facts, the court of common pleas rendered a judgment, from which an appeal was taken to this court.

Pratt, for the tenant.

N. Morton, for the demandants.

Shaw, C. J. This case is settled by authority. *Sheafe* v. *O'Neil*, 9 Mass. 9, was this very case of a mortgage made by the husband, in which the widow had not joined, and by which she was not bound. This rule is not altered, but, on the contrary, is confirmed and sanctioned by the Rev. Sts. c. 60, §§ 1 – 3. (See commissioners' report.) Sect. 3 provides that "when a widow is entitled to dower in lands of which *her husband died seized*, and her right to dower is not disputed by the heirs or devisees, it may be assigned to her, by the judge of probate for the county in which the estate of the husband is settled." The assignment of dower, by the judge of probate, in the present case, was void, as against

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the mortgagees, it not being within the jurisdiction vested in him by statute. As against the mortgagees, the husband did not die seized of the premises. The power of the judge to assign dower is solely a statute power, and is not analogous to any proceeding of the probate court, as a court of ecclesiastical jurisdiction.

But the widow is not without remedy. Her husband having been seized during the coverture, and she not having released, she is entitled to her dower, against the mortgagees, by writ of dower. Rev. Sts. *c.* 60, §§ 1, 5, and *c.* 102.

As a general rule of law, it is held, that until assignment, a widow has a right, but no seizin. But, by statute, she may occupy lands in which she is entitled to dower, with the consent of the heirs, without having her dower assigned. Rev. Sts. *c.* 60, § 6. The court are therefore of opinion that the present tenant is not a mere stranger, but one entitled to hold, with the consent of the heirs. She holds under and in right of her husband, who was the mortgagor; and she may, at her election, have a conditional judgment, the effect of which will be, that if she complies with the condition, her possession will not be disturbed, and the rights of the demandants will be fully preserved. Rev. Sts. *c.* 107, §§ 3, 4.

ABIGAIL JOHNSON *vs.* SARAH L. WILMARTH.

J., holding a note against W., who died solvent, and of whose estate his son G. was administrator, demanded payment of the note from G., and threatened to put it in suit, if it were not paid: A sale of W.'s real estate was necessary, in order to pay his debts, and a sale thereof, when this demand was made, would have been at a sacrifice: S., the widow of W., for the sake of preventing such sacrifice, guarantied payment of the note, and received from G. a deed of his share of W.'s real estate; and J. forbore to sue on the note, but did not give S. notice that G. had not paid it: After a suit against G., as administrator, was barred by the statute of limitations, (Rev. Sts. *c.* 66, § 3,) J. sued S. on her guaranty. *Held*, that the guaranty was on a sufficient consideration, and that the omission to give S. notice of non-payment by G. furnished no defence to the suit, as she was not prejudiced by such omission

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Assumpsit on a guaranty of the following note: "Taunton, April 1st 1840. For value received, I promise to pay Abigail Johnson thirty five hundred and fifty five dollars, on demand, and interest. Dan Wilmarth." The guaranty was on the note, and was thus: "August 13th 1844. I guarantee this note. Sarah L. Wilmarth."

The trial was before *Hubbard*, J. whose report thereof was as follows: "It was agreed that Dan Wilmarth, the maker of the note, died in about a year after it was given, and that administration on his estate was granted to his son, George L. Wilmarth, June 21st 1841, who duly gave notice of his appointment, and perpetuated the evidence of it in the probate court, September 6th 1841, in pursuance of the provision of the Rev. Sts. c. 66, §§ 1, 2; that the said Dan Wilmarth left estate sufficient to pay all his debts; that the defendant is his widow, and that dower was assigned to her, in her husband's estate, in June 1843; that the plaintiff received some small payments on the note, before the date of the guaranty: the first, November 2d 1841, and the last, September 8th 1843; in the whole not varying much from the interest due on the note.

"It appeared in evidence, that the plaintiff, in 1842, made known her intention of suing the note, if it should not be paid; that this was told to the administrator, and that the defendant was also informed of it, at the plaintiff's request, in June 1844, and that the defendant then said she was willing to do what she ought to do and was able to do, to prevent a suit; that she said they were dependent on the sale of the real estate, and that to sell it at that time, would be attended with much sacrifice; that she signed the guaranty in the August following; that no particular proposition was stated at the time of her so signing the guaranty; but that she said she put her whole confidence in George (the administrator) as to the management of the business, and if her signature would prevent a sacrifice of the property, she was willing to do it; that she showed the writing to George, on his coming in, and asked him if it was correct, and upon his saying that

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it was, she signed it, George and she saying that their intention was to sell the property some time in the next spring; and that the agent of the plaintiff, immediately afterwards, delivered the note to her.

"It also appeared in evidence, that the administrator, on the 7th of December 1844, paid $500 on the note, and $145·58, on the 20th of January 1845, and $100, on the 10th of January 1846.

"A deed from George L. Wilmarth to the defendant, dated May 3d 1841, conveying to her all his interest in the real estate of his father, was put into the case by the plaintiff.

"It was admitted that the note, which was the subject of the guaranty, was barred by the statute of limitations. Rev. Sts. c. 66, § 3.

"The defendant objected that the plaintiff was not entitled to recover: *First*, because there was no agreement to forbear a suit upon the note, and so the defendant's promise was without consideration. *Second*, that if there was any agreement to forbear, it was for no specified term of time, and therefore that, before an action can be maintained on the guaranty, a demand must be made on the defendant; and that no demand was proved. *Third*, that the plaintiff not having sued the administrator within four years from the taking of the letters of administration, the demand against the estate was lost before the commencement of this suit, and the defendant is therefore not now answerable, by reason of the plaintiff's laches; she having, in consequence thereof, lost all claim upon the estate, in case a recovery should be had against her in this action.

"Upon the foregoing evidence and admissions, the judge directed a verdict for the defendant. If this direction was erroneous, and justice requires it, the verdict is to be set aside, and a new trial granted; otherwise, the verdict is to stand."

N. Morton, for the plaintiff. The words of the guaranty were an absolute assumption and promise to pay the debt secured by the note. It was also a written promise, within

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the meaning of the statute of frauds. And the facts show two grounds of consideration; viz. a benefit to the defendant and a detriment to the plaintiff. The sacrifice of the real estate was prevented, and the plaintiff forbore to attach that estate. *Ulen* v. *Kittredge*, 7 Mass. 233. *Smith* v. *Ide*, 3 Verm. 301. *Mason* v. *Pritchard*, 12 East, 227. Story on Notes, §§ 468–473. *Upham* v. *Prince*, 12 Mass. 14. *Flagg* v. *Upham*, 10 Pick. 147. *Read* v. *Cutts*, 7 Greenl. 186. *Allen* v. *Rightmere*, 20 Johns. 365. *Breed* v. *Hillhouse*, 7 Connect. 523.

If any thing remained, in order to make the contract absolute — as notice or demand — the defendant cannot defend without showing that she has suffered by want of such notice or demand. This case differs from that of *Oxford Bank* v. *Haynes*, 8 Pick. 423, where there was an insolvency. Here, there was none.

The claim that is barred by the statute of limitations that of the plaintiff, as creditor of the estate, against the administrator. The defendant's claim is not as creditor of her husband, and is not barred by the statute.

The payment of interest on the note, after the four years, was a waiver of the plaintiff's laches in not suing before the four years elapsed. Such payment was for the defendant's benefit, as it could not be paid out of her husband's estate. See *Sigourney* v. *Wetherell*, 6 Met. 553.

Pratt & Clifford, for the defendant. There was no consideration for the guaranty, except that of forbearance, which is not shown. *Tenney* v. *Prince*, 4 Pick. 385, and 7 Pick. 243. Or if there was any valid guaranty, it has been lost by the negligence of the plaintiff to collect the note of the administrator, and by his omission to give the defendant notice of non-payment. *Philips* v. *Astling*, 2 Taunt. 206. *Gibbs* v. *Cannon*, 9 S. & R. 202. *Samuell* v. *Howarth*, 3 Meriv. 272. *Baker* v. *Briggs*, and *Oxford Bank* v. *Haynes*, 8 Pick. 122, 423. *Talbot* v. *Gay*, 18 Pick. 534. *Sage* v. *Wilcox*, 6 Connect. 81. *Hunt* v. *Brown*, 5 Hill, 145. Story on Notes, § 472. What was said by the court, in *Isett* v. *Hoge*,

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2 Watts, 129, may be said in the present case: "It is impossible to say the money would not have been obtained, had the debt been pressed; and to suffer the plaintiff to recover against the guarantor, under these circumstances, would expose the latter to loss which was probably produced by the supineness of another."

Eliot, in reply. An agreement to forbear a suit appears on the face of the paper; and if it did not, the fact, that there was such forbearance afterwards, would be sufficient evidence of such an agreement. *Moies* v. *Bird*, 11 Mass. 436. Story on Notes, § 186. *Walker* v. *Sherman*, 11 Met. 170.

Notice to the defendant, and demand on her, would have been of no benefit to her. No demand was made in *Sumner* v. *Gay*, 4 Pick. 311, nor in *Williams* v. *Granger*, 4 Day, 444, nor in *Marsh* v. *Day*, 18 Pick. 321, nor in *Tenney* v. *Prince*, cited for the defendant. See also *Frye* v. *Barker*, 4 Pick. 382.

The defendant has not lost her claim against the estate of her husband, if she ever had any. She can have no claim, without first paying the demand. On paying it, she will have a remedy against the heirs. Rev. Sts. c. 70, §§ 13–15. But the plaintiff has lost his claim against the estate.

Wilde, J. This was an action of assumpsit on the defendant's promise to guaranty the payment of a promissory note of hand; and the first question to be considered is, whether there were a sufficient consideration for that promise.

It was proved at the trial, that the plaintiff threatened to commence a suit against the administrator of the estate of the maker of the note, and that thereupon, at the request of the plaintiff and the administrator, and to prevent the sacrifice of the real estate, (which was apprehended,) the defendant signed the guaranty. It was also proved, that before that time the administrator, who was the son of the maker of the note, had given a deed of all his interest in the real estate of his father, to the defendant.

Upon these facts, we are of opinion that there was a good and sufficient consideration for the guaranty. In the first

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place, it was given to prevent the sacrifice of the real estate in which the defendant had an interest; and this must be considered as a benefit to her. In the second place, the plaintiff's forbearance to sue the administrator was a sufficient consideration; it being a well settled principle that the forbearance to sue a present claim or debt is a good consideration for a promise. 1 Comyn on Contracts, (1st ed.) 13, 14.

It was objected that there was no agreement to forbear a suit on the note against the administrator, and that therefore there was no consideration for the defendant's guaranty at the time it was given. But we think such an agreement may be inferred from the facts reported. But if it were otherwise, actual forbearance by the plaintiff to sue the administrator was proved, and is not denied; and it was proved that the guaranty was signed by the defendant for the express purpose of delaying the suit against the administrator, which the plaintiff threatened to commence before she signed the guaranty. We are therefore of opinion, from the facts reported, that there was a good consideration for the defendant's guaranty. *Breed* v. *Hillhouse*, 7 Connect. 523. *Walker* v. *Sherman*, 11 Met. 170. *Lent* v. *Padelford*, 10 Mass. 230.

The remaining question to be decided is, whether the defendant has been discharged from her liability by the laches of the plaintiff. It is contended by the defendant, that as the plaintiff neglected to sue the administrator, until her claim against him was barred by the statute of limitations, (Rev. Sts. c. 66, § 3,) the defendant has thereby lost all claim against the estate of the deceased, in case a recovery should be had against her in this action. With regard to this objection, we are to consider that it was the understanding of the parties, at the time when the defendant undertook to guaranty the payment of the note, that the plaintiff was not to sue the administrator for an indefinite time, and that it was the intention of the administrator to sell the property some time in the spring after — a very short time before the action against the administrator was barred. These facts considered, we think the plaintiff was not bound to demand of the administrator

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payment of the note, or to notify the defendant of its non-payment. But if it were otherwise, it does not appear that the defendant has suffered any damage by the omission. If by law she had any claim of indemnity from the estate of the deceased, it has not been defeated by the omission to sue the administrator; for, although the action against him is barred, the defendant will be entitled to indemnity against the heirs. Rev. Sts. c. 70, § 14. But if the administrator is responsible personally, as we think he is — as the defendant gave her guaranty at his request — there is no evidence to prove, or tending to prove, his insolvency, or inability to pay; so that in no respect has the defendant been prejudiced by the plaintiff's omission to notify her of the non-payment of the note.

New trial granted.

LABAN M. WHEATON *vs.* SARAH L. WILMARTH.

After a suit against an administrator, who was also one of the heirs of his intestate, who died solvent, was barred by the statute of limitations, (Rev. Sts. c. 66, § 3,) the administrator, by consent and agreement of the intestate's widow, made a note, payable to her or order, for a debt due from the estate to W., and she indorsed it to W. *Held*, in a suit by W. against the widow, on this note, that it was given on a good and sufficient consideration.

The following notice, seasonably given, was held sufficient to bind the indorser of note, which was made payable at a bank: "April 20 1846. Mrs. S. L. Wilmarth Please to take notice that a note, signed by George L. Wilmarth, for three thousand dollars, indorsed by you, is due this day, and by me protested for non-payment. You are requested to pay the same to the holder. E. F. Notary Public."

In an action against the indorser of a note, the maker, if released by the indorser, is a competent witness for him.

THIS was an action of assumpsit on a note, dated January 17th 1846, for $3000, made by George L. Wilmarth, payable to the defendant, or her order, in three months after date, at the Attleborough Bank, and indorsed to the plaintiff, by the defendant, on the day of its date.

At the trial before *Hubbard*, J. the signatures of the maker and indorser were admitted by the defendant; and it was also

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proved or admitted, that the plaintiff had never transferred the note, nor procured it to be discounted. The following notice was also proved to have been seasonably given to the defendant: "Attleborough, April 20th 1846: Mrs. Sarah L. Wilmarth. Please to take notice that a note, signed by George L. Wilmarth, for three thousand dollars, indorsed by you, is due this day, and by me protested for non-payment. You are requested to pay the same to the holder. Yours respectfully, Elias Fuller, Notary Public."

For the purpose of showing that the note was without any legal consideration, and could not be recovered of the defendant, the following facts were proved or admitted: That the plaintiff gave a receipt of the same date with the note in suit, in the following words: "Taunton, January 17th 1846. Received of George L. Wilmarth, as administrator, a note of three thousand dollars, of this present date, payable, in three months from date, at Attleborough Bank, which, when paid, shall be applied towards the payment of a note signed by Dan Wilmarth, dated October 12th 1840, for four thousand dollars, in one year, interest half yearly. Laban M. Wheaton:" That the note in suit was given for the note mentioned in said receipt, and was for about the amount which remained unpaid on said note: That said Dan Wilmarth died in April or May 1841, leaving property more than sufficient to pay his debts, and that said George L. Wilmarth, in June 1841, was appointed administrator of his estate, and took upon himself said trust, by giving bond as the law directs; and that he, within three months, gave due notice of his said appointment.

Upon these facts, the defendant's counsel contended that the note, mentioned in said receipt, and held by the plaintiff, against Dan Wilmarth, being barred by the statute of limitations, (Rev. Sts. c. 66, § 3,) so that it could not be recovered against the estate or administrator of said Dan Wilmarth, at the time when the note in suit was made and indorsed, the defendant was not liable on said note, and that the action could not be maintained against her.

The defendant, having released said George L. Wilmarth

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the maker of the note in suit, from any liability to her, called him as a witness, and offered to prove, by him, the following facts: That on the day when the note in suit was made, the plaintiff called on him, as administrator, to pay the note mentioned in the receipt; to which the witness replied, that he had not funds then to pay it; that the plaintiff then stated that he had to pay a large sum in Boston, in a few days, and asked the witness to give him a note for about what was unpaid on said note, payable on time, at the Attleborough Bank, and get his mother (the defendant) to indorse it, and he (the plaintiff) would get it discounted at said bank, and it would be an accommodation to him: That the note in question was then made, and the witness signed it, and the receipt was made and signed, and the witness carried the note to the defendant, and stated to her the conversation with the plaintiff, and asked her to indorse it, which she declined to do, and stated reasons for her refusal; that the plaintiff came into the house soon after, and it was then stated by him to the defendant, that he wished to raise money to pay in Boston, and that, if she would accommodate him by indorsing the note, he would get it discounted at the Attleborough Bank, and would pay it, or take it up, when it should become due, and that she should never be called upon for it; and that the defendant thereupon indorsed the note, and it was delivered to the plaintiff.

The defendant also offered to prove by said George L., that when the note in suit was given, he did not know that the note, which the plaintiff held against Dan Wilmarth, was barred by the statute of limitations; and also to prove, by him, certain facts tending to show that the defendant did not know it.

The plaintiff objected that said George L., being the maker of the note, was not a competent witness, and the judge so ruled. A verdict was taken for the plaintiff, subject to the opinion of the whole court, whether the action can be maintained on the foregoing facts, and whether said George L. Wilmarth was properly rejected as a witness.

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Pratt, for the defendant. The note in suit was without consideration; the note in payment of which it was given being barred by the Rev. Sts. *c.* 66, § 3. No forbearance to sue the barred note could be given, or, if given, could be of any avail. *Fish* v. *Richardson*, Yelv. 55. *Rosyer* v. *Langdale*, Style, 248. *Jones* v. *Ashburnham*, 4 East, 455. 2 Saund. 137 *c. note.* Chit. Con. (5th Amer. ed.) 35. An administrator is bound to rely on the statute, limiting actions against him to four years; and his omission so do to shall injure nobody but himself. See *Dawes* v. *Shed*, 15 Mass. 6. *Emerson* v. *Thompson*, 16 Mass. 431. *Hall* v. *Bumstead*, 20 Pick. 2. *Thayer* v. *Hollis*, 3 Met. 369.

The plaintiff lost no claim on any fund, by giving up the first note. No license could have been obtained for the sale of the intestate's real estate, for payment of the plaintiff's note. *Scott* v. *Hancock*, 13 Mass. 162. *Nowell* v. *Nowell*, 8 Greenl. 220.

The defendant, as indorser, is no more liable than the maker. *Tenney* v. *Prince*, 4 Pick. 385, and 7 Pick. 243. *Strong* v. *Tompkins*, 8 Johns. 98.

The testimony of the maker of the note ought not to have been excluded; he being released by the defendant. The rule, that a party shall not impeach an instrument to which he has given currency, does not apply. The plaintiff is the original holder, and stands like an original payee. The offered testimony respected facts that occurred after the witness had signed the note. See 1 Greenl. on Ev. § 400. *Chazournes* v. *Edwards*, 3 Pick. 5. *Warren* v. *Merry*, 3 Mass. 27. In *Churchill* v. *Suter*, 4 Mass. 156, the holder was not conusant of the taint in the note. The cases on this subject were fully considered in *Thayer* v. *Crossman*, 1 Met. 416.

The notice to the defendant was insufficient. It did not state that the note was dishonored; unless mention of the protest shows dishonor. *North Bank* v. *Abbot*, 13 Pick. 465. *Gilbert* v. *Dennis*, 3 Met. 495.

Eliot, for the plaintiff. As this is an action by indorsee

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against indorser, it is not necessary to show any consideration for the note. But here was a sufficient consideration, viz. a debt barred by the statute of limitations. The maker was heir as well as administrator; and though he did not bind the estate of the intestate, by giving the note in suit, yet he bound himself. Story on Notes, §§ 185, 191. *Maxim* v. *Morse*, 8 Mass. 127.

The testimony which was offered to be given by George L. Wilmarth was not competent. If the facts, thus offered to be shown, had been otherwise proved, he might be a competent witness. The old doctrine, that a party shall not impeach an instrument negotiated by him, is adhered to in this Commonwealth. *Thayer* v. *Crossman*, 1 Met. 416. See also *Henderson* v. *Anderson*, 3 Howard, 73. *Bank of United States* v. *Dunn*, 6 Pet. 51. *Bank of the Metropolis* v. *Jones*, 8 Pet. 12. Besides; the evidence itself was inadmissible, whoever might be the witness. *Emerick* v. *Harley*, 2 Whart. 50. *Bradley* v. *Anderson*, 5 Verm. 152. *Caldwell* v. *May*, 1 Stew. 425. *Erwin* v. *Saunders*, 1 Cow. 249. *Cunningham* v. *Wardwell*, 3 Fairf. 466. *Hoare* v. *Graham*, 3 Campb. 57. *Trustees, &c.* v. *Stetson*, 5 Pick. 506.

The notice to the defendant, of non-payment by the maker, was sufficient. *Mills* v. *Bank of United States*, 11 Wheat. 431. 1 Amer. Lead. Cas. 229 *& seq.* *Pinkham* v. *Macy*, 9 Met. 174.

Clifford, in reply. It was not necessary that the facts, proposed to be shown by the maker of the note, should be proved by other witnesses, in order to render the maker a competent witness. He may restore his own competency by his own testimony. 2 Smith's Lead. Cas. (Philad. ed. 1847,) 47, 88–91. *Miller* v. *Stem*, 2 Barr, 286. *Fox* v. *Whitney*, 16 Mass. 118. *Van Schaack* v. *Stafford*, 12 Pick. 565. See also *Wade* v. *Simeon*, 2 Man. Grang. & Scott, 548.

Wilde, J. In this action of assumpsit on a promissory note made by George L. Wilmarth, payable to the defendant, and by her indorsed to the plaintiff, the principal ground of

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defence is, that the note was given in payment of a note signed by Dan Wilmarth, payable to the plaintiff, which had been barred by the statute of limitations; and so that the note in suit was void for want of consideration.

If the note in suit had been given by Dan Wilmarth, in his life time, after it had been barred by the statute of limitations, it would have been unquestionably a valid note.

Formerly, the idea prevailed, that an express promise, founded simply on an antecedent moral obligation, was a valid promise. And so the rule was laid down by Buller, J. in *Hawkes* v. *Saunders*, Cowp. 294. "The true rule," he says, is, "that wherever a defendant is under a moral obligation, or is liable in conscience and equity to pay, that is a sufficient consideration." And in the same case, Lord Mansfield says, that "where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration; as if a man promise to pay a just debt, the recovery of which is barred by the statute of limitations; or if a man, after he comes of age, promises to pay a meritorious debt contracted during his minority; or if a bankrupt, after his certificate, promises to pay the whole of his debts."

Notwithstanding the general and comprehensive language of the rule laid down by these eminent judges, it must be understood as limited to the case decided, and to those cited in support of it, and to similar cases. And so are the authorities. The cases are collected in a note in 3 Bos. & Pul. 249, 252. The limitation there suggested seems to us to be well founded, and to be supported by the cases cited. "An express promise," it is said, "as it should seem, can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision." See also Yelv. (Amer. ed.) 41 *b. note.* *Valentine* v. *Foster* 1 Met. 520.

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By the rule thus restricted, we are of opinion that the note sued was given on a good and sufficient consideration. George L. Wilmarth, the maker, was one of the heirs, and the administrator of the estate of Dan Wilmarth, the maker of the note in payment of which the note in suit was given; and for years after taking out letters of administration he was liable to be sued thereon. George L. Wilmarth, therefore, was under a moral obligation and a former legal liability to pay the note of Dan Wilmarth, which was a sufficient consideration for the new note, within the rule laid down in *Hawkes* v. *Saunders;* and the decision in that case is directly in point. That was an action against an executrix, upon her promise to pay a legacy, in consideration of assets, and the consideration was held to be sufficient. It was afterwards decided, in *Deeks* v. *Strutt*, 5 T. R. 690, that no action at law could be maintained for a legacy; but that was an action on an implied promise, and had no reference to the case of *Hawkes* v. *Saunders*, which was founded on an express promise. The defendant was charged with a personal promise to pay the legacy, and not upon a qualified promise to pay as executrix; and the court say, "that case did not at all involve in it the question, whether a legatee has a general right to sue for a legacy in that court." The case of *Deeks* v. *Strutt*, therefore, does not at all apply to the case of *Hawkes* v. *Saunders*, although the contrary is erroneously stated in the note in 3 Bos. & Pul. before cited.

We consider, therefore, that the decision, in the case of *Hawkes* v. *Saunders*, is founded on a correct rule of law, which is confirmed by subsequent decisions, and is applicable to the present case. Story on Notes, § 185, and the cases there cited.

The cases cited to maintain the rule of law, that an executor or administrator, after a demand against him is barred by the statute of limitation, cannot revive the demand by a new promise, so as to bind the heirs, are not applicable. It does not follow that he may not bind himself. We therefore consider the note sued to be valid against the maker, and that, if

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the defendant's indorsement was fairly obtained, the plaintiff would be entitled to judgment.

An objection was made to the sufficiency of the notice of non-payment to the defendant. But this objection was not pressed at the argument, and we think the notice sufficient. It was sufficient to inform the defendant that the note had been dishonored, and that the plaintiff looked to her for payment.

But we are of opinion that the defendant is entitled to a new trial, on the ground that the testimony of George L. Wilmarth should have been admitted. He, having been released by the defendant, was not interested, in her favor, in the event of the suit; and the case is not within the rule laid down in *Churchill* v. *Suter*, 4 Mass. 156.

The facts offered to be proved by him may be material, as they have a tendency to show that the defendant was induced to indorse the note by false and fraudulent pretences; and if it should be so proved, to the satisfaction of a jury, the action must fail. *New trial granted.*

JOHN S. COTTON *vs.* THE POCASSET MANUFACTURING COMPANY.

A right to empty a town drain upon the land of an individual cannot be acquired by twenty years' use, unless the drain be one and the same, and the use thereof uninterrupted during that number of years: If the drain, during those years, be enlarged, deepened, and varied in its course and termination, the town cannot acquire such right, as against the owner of the land, by using the drain less than twenty years after it is thus enlarged and altered.

So a person who enters a drain from his cellar into a town drain which is afterwards enlarged, deepened, and varied in its course and termination, and who subsequently deepens his cellar, and lays the drain therefrom deeper than it was before, and enters it into the altered town drain, cannot acquire a right thus to drain his cellar, by a use of the town drain for less than twenty years after it is altered.

It seems, that when a cellar is flowed by water which is set back through the drain therefrom, by the raising of a mill dam, the remedy, if any, of the owner of the cellar, is under the mill act, (Rev. Sts. *c.* 116,) and not by action at common law.

When a drain is made to discharge itself upon private land, without the owner's consent, and he has not acquiesced for twenty years, he is not liable to an action at law, nor to the process prescribed by the mill act, for raising a mill dam on his land, and thereby obstructing the drain and flowing the cellars connected with it

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Cotton v. Pocasset Manufacturing Company.

THIS was an action of trespass upon the case, in which the plaintiff's declaration alleged that the defendants, on the 15th of September 1844, and on divers other days afterwards, took up and removed a drain or sewer leading from the plaintiff's cellar, under Main Street in Fall River, to and through the defendants' close, and erected the foundation of a building across the place where said drain or sewer ran, and placed earth and rubbish there, so as to prevent water from running off from the plaintiff's cellar, and changed the position of parts of a certain dam, waste-way and floom, and so placed earth, stones, timber, planks, boards and other materials, as to cause the water of a certain mill pond to flow, through said drain or sewer, into the plaintiff's cellar.

The trial was before *Hubbard*, J. and all the testimony in the case was reported. So much of it as is necessary to an understanding of the points decided by the court is contained in the following statement:

The plaintiff was the owner of a store standing in the northeast corner made by the intersection of Main Street by Bedford Street, in Fall River. The defendants were the owners of a mill dam, of which Main Street formed a part, flowing water on the eastern side of that street. By reason of the defective structure of this dam, the waters percolated, in considerable quantities, through its foundation.

It was in evidence that, after the town had widened Main Street, the defendants, in the spring of 1844, erected a block of stores and tenements upon their close, on the westerly side of that street, and so laid the foundation of said block upon the line of that side of said street, and so prepared the ground of said street, in front of said block, as to make a tight dam for their mill pond, and permanently to prevent the flowing of water from any drains which had conducted water from Bedford Street, across Main Street, upon their close.

There was evidence tending to prove that there was an ancient town drain running, from a point a few feet in front of the plaintiff's store, southward across Bedford Street, and thence continuing southwesterly across Main Street, to the

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defendants' close, through which the water from those streets ran off; and that about 20 years before the commencement of this action, a drain, from the cellar of the plaintiff's store, was made into that drain.

It was also in evidence that the part of the town drain, which crosses Main Street, was found, in 1830, to be filled up, and that another town drain was then made instead, and was made wider and deeper than the former one, and was varied from it, in its course and in its termination: That in 1843, the plaintiff made his cellar from 10 to 12 inches deeper than it was before, and at the same time increased the depth of the drain from it to the town drain; and that, but for these changes in the depth of his cellar and drain, the water from the pond of the defendants would not have flowed into his cellar.

The defendants contended, that there was not evidence to show the existence of any one drain, passing across Main Street, for the period of twenty years, with which the plaintiff's drain had been connected. And the jury were instructed that, in order to find for the plaintiff, they must be satisfied that there had been one and the same drain across Main Street uninterruptedly for twenty years before this action was brought, and that the plaintiff's drain was connected with that drain; that if there was a drain, before the town drain that was made in 1830, yet if the latter drain was made wider and deeper than the former, breaking it up, or essentially varying its termination upon the defendants' land, then it was not, in legal effect, the same drain; and that there must be a constant, unbroken use of substantially the same drain, by the town or individuals, for twenty years, in order to give a right by adverse enjoyment.

The defendants also contended, that if the water flowed into the plaintiff's cellar, by means of his deepening the cellar and the drain in the street between the cellar and the town drain in Bedford Street, in 1843, without license of the town, the plaintiff was not entitled to recover, and that any right which the plaintiff might have to enter his drain into

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the town drain, and to pass the water from his cellar through said drain upon the defendants' land, was terminated by the act of the town in building a new drain and abandoning the old drain; and also, that if the water from the plaintiff's cellar was let into a town drain, and through that upon the defendants' land, without the defendants' knowledge, then no adverse right was acquired. But the judge, for the purposes of the trial, instructed the jury, that if the town drain under Bedford and Main Streets had existed, essentially in the same place and state, for twenty years before the plaintiff's action was commenced, the town had acquired a right to have their drain empty itself upon the defendants' land, and that the plaintiff had a right to enter the drain from his cellar into the town drain, and to have the water run through it upon the land of the defendants, although the plaintiff's drain had not existed twenty years. And the jury were also instructed, that if the flowing of the water into the plaintiff's cellar was caused by the removal of the bulk head or dam westward of its former position, or by the filling or building of the street, and these were done by the town, or the agents of the town, then the defendants were not liable.

The defendants furthermore contended, that as it appeared that if any thing had been done by the defendants to cause the water to flow into the plaintiff's cellar, it was by a mill dam erected, continued and maintained for the purpose of raising water for the working of a water mill, the remedy of the plaintiff, if any, must be sought under the provisions concerning flowing, contained in the Rev. Sts. c. 116. But the judge, for the purposes of the trial, instructed the jury, that this action was the proper remedy for the plaintiff.

A verdict being returned for the plaintiff, the defendants moved for a new trial, because the verdict was against the evidence. Exceptions were also taken to the instructions given to the jury.

Holmes & Battelle, for the defendants.

Eliot, for the plaintiff.

Wilde, J. The defendants move for a new trial on several

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grounds. In the first place, it is contended that the instructions to the jury were erroneous, as to the plaintiff's right to drain the water from his cellar into the town drain. The instructions were, that if the town drain had existed essentially in the same place and state, for a period of twenty years before this action was commenced, the town had gained a right to have their drain empty itself upon the defendants' land, and that the plaintiff would have the right to enter the drain from his cellar into the town drain, and to have the water run through it, upon the land of the defendants, although the plaintiff's drain had not existed for twenty years.

These instructions, we think, were incorrect, and were material to the issue to be tried. It is a well settled rule of law, that if a person has a right of way over the land of another, to a particular close, he cannot enlarge it and extend it to other closes. It was so decided in *Davenport* v. *Lamson*, 21 Pick. 72. The same principle manifestly applies to the present case. If the plaintiff has acquired the right in question, it must be in the right of the town; and the town clearly have acquired no such right. For it is plain, from the evidence, that a material alteration has been recently made in the plaintiff's drain, without which his cellar would not have been flowed. Nothing short of an acquiescence of the defendants, for twenty years, in such an alteration, would authorize the presumption of a grant, either in favor of the town or the plaintiff. We are therefore of opinion that, on this ground, the defendants are entitled to a new trial.

We are also of opinion that the verdict is against the evidence in respect to the town drain. It appears from the evidence, that within twenty years before the plaintiff's action was commenced, a new drain was opened by the town, which was made larger and deeper than the former drain, and partly in a different place. On this point, the jury were instructed "that in order to find for the plaintiff, they must be satisfied that there had been one and the same drain across Main Street, uninterruptedly, for a period of twenty years, before the action

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was brought, and that the plaintiff's drain was connected with that drain." This instruction was unquestionably correct; and in conformity to it, the evidence does not support the verdict.

Another ground of defence is relied on by the defendants, which we are strongly inclined to think would be decisive in their favor, if the other grounds should fail.

It is contended that the plaintiff's remedy, if he has been injured, is under the mill act, (Rev. Sts. c. 116,) the first section of which authorizes the erection of a water mill, and a dam to raise the water for working it; and the fourth section of which provides, that any person, whose land is overflowed, or otherwise injured by such dam, may obtain compensation therefor, in the manner provided in that act. This case, if the plaintiff is entitled to any remedy, comes certainly within the words of the statute; and we perceive no reason to doubt that it is within its true meaning. We are, however, of opinion that, upon the evidence reported, the plaintiff is not entitled to an action in any form. *New trial granted.*

JAMES H. CLARK *vs.* WILLIAM GORDON & another.

In an action brought by the assignees of an insolvent debtor to try the validity of a sale of chattels made by him shortly before proceedings in insolvency were instituted against him, he is a competent witness for the purchaser, to prove that the sale was not made for such purpose, or with such intent and knowledge, as rendered it void against his creditors.

SHAW, C. J. This was an action of trover to recover the value of thirty four tons of pine timber, alleged to have been converted by the assignees of Oliver Smith, an insolvent debtor. At the trial, before Mr. Justice Hubbard, at the last May term at Plymouth, the plaintiff claimed title to the timber under a sale made to him by said Smith, on the 25th of April 1846. The defendants showed that Smith went into insolvency on

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the 30th of May 1846, and that they, as his assignees, took possession of the timber, on the 10th of June following, as his property. And they alleged and undertook to prove, in justification of their conduct in the premises, and as a defence to this action, that Smith was indebted to the plaintiff, at the time of said sale, in the sum of $250 on a note and on account, and agreed to receive payment for the timber (the price of which was $272) in his note to be given up, and by a credit on account for the balance. Evidence was given of these facts, and the questions for the jury were, whether Smith was insolvent at the time of said sale, or whether, being insolvent, or in contemplation of insolvency, he made the sale to the plaintiff, intending to give him a preference, as a preëxisting creditor, and whether the plaintiff, at that time, had reasonable cause to believe that Smith was insolvent. (*Sts.* 1838, *c.* 163, § 10; 1841, *c.* 124, § 3; 1844, *c.* 178, § 8.) Smith was called as a witness by the plaintiff, and was asked whether, in making the sale to the plaintiff, he intended to prefer him, and whether, at that time, he contemplated insolvency. And the witness was permitted, notwithstanding the defendants' objection, to answer this question. His answer was, that he had no intention of preferring the plaintiff, and had no intention or expectation, at that time, of suspending his business. The jury found a verdict for the plaintiff, subject to the opinion of the whole court, as to the competency of the witness to give said testimony.

The court are of opinion that Smith, the insolvent debtor, was a competent witness; because he was not interested in the event of the suit. The question of the intent, with which he made the sale, became material. It was a question of fact, and might be proved by the testimony of the party himself, if he was so situated as to be competent. Perhaps the reason why this proof is not more commonly relied on is, that frequently the party, who is alleged to have acted with an unlawful intent, or under an unlawful motive, is a party to the suit, or has some interest in the event of the suit. In that case, the intent and motive may be inferred, by the jury, from

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facts and circumstances proved. Still it is a fact to be proved; in the one case by positive, in the other by circumstantial evidence, both of which are admissible, when given by competent witnesses. *Judgment on the verdict.*

Coffin, for the defendants.

Eliot, for the plaintiff.

HENRY SOULE *vs.* THOMAS RUSSELL.

A declaration sufficiently shows, after verdict, that the action respects an easement on real estate within the *St.* of 1840, *c.* 87, § 1, by alleging that the plaintiff was seized and possessed of a mill, mill dam and water privilege on F. Brook, and had a right to the use of the water in said brook, for the raising of a head of water, and for the driving of his said mill, without molestation, and that the defendant erected, over and across said brook and another brook leading into the same above the plaintiff's mill, a dam, in such an insecure, unskilful, loose and unworkmanlike manner, that after raising a great body of water in said stream, above the plaintiff's mill, the defendant's dam was carried away by reason of this improper and insecure construction, by means whereof a large and unusual quantity of water was let down upon the plaintiff's dam and mill, whereby the same were greatly damaged, and a large quantity of sand was washed and thrown into the pond of the plaintiff, by which the same was much diminished in capacity for containing water, and his mill privilege thereby greatly reduced in value, and he was put to the expense of $200 for the repairs of the same, and was subjected to great loss by the interruption of the business of his mill.

When there are two counts in a declaration, and the jury bring in a verdict for the plaintiff on one count, and state that they cannot agree upon a verdict on the other, the court has authority to permit the plaintiff to amend by striking out the other count, and to allow the jury to return their verdict generally for the plaintiff.

When a jury disagree as to one count in a declaration, and find for the plaintiff on the other count, and he thereupon strikes out the count on which they disagree, the defendant is not entitled, under Rev. Sts. *c.* 121, § 16, to the costs of the trial on that count.

THE declaration, in this case, contained the following counts: "For that the plaintiff was, on the first day of November last past, and unto this day is, seized and possessed of a certain mill, mill dam and water privilege on Furnace or Trout Brook, so called, in Kingston, in the county of Plymouth, and had a right to the use of the water in said brook,

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for the raising of a head of water, and for the driving of his said mill, without molestation; and the plaintiff avers that the defendant, on said day, and before that time, had erected, over and across said brook and another brook leading into the same, above the plaintiff's mill and dam, a certain dam, in such an insecure and loose manner, that after raising a great body of water in said stream, above the plaintiff's mill, his the defendant's dam was carried away, by reason of this improper and insecure construction; by means whereof, a large and unusual quantity of water was let down upon the plaintiff's said dam and mill, whereby the same was greatly damaged, and he was put to the expense of one hundred dollars for the repair of the same, and was subjected to great loss by the interruption of the business of his said mill.

"And also, for that the plaintiff afterwards, on the first day of March last past, and unto this day, was seized and possessed," &c. (as in the first count;) "and the plaintiff avers that the defendant, on said day and before that time, had erected over and across said brook and another brook leading into the same, above the plaintiff's mill and dam, a certain other dam, other than the first named dam, in such an insecure, unskilful, loose and unworkmanlike manner, that after raising a great body of water in said stream, above the plaintiff's mill, his the defendant's dam was carried away by reason of this improper and insecure construction, by means whereof a large and unusual quantity of water was let down upon the plaintiff's said dam and mill, whereby the same was greatly damaged, and a large quantity of sand was washed and thrown into the pond of the plaintiff, by which the same was much diminished in its capacity for containing water, and his mill privilege thereby greatly reduced in value, and he was put to the expense of two hundred dollars for the repairs of the same, and was subjected to great loss by the interruption of the business of his said mill."

The defendant's counsel, before pleading, moved that the writ and action should be dismissed, because this court had no jurisdiction thereof, and because the affidavit required by

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St. 1840, *c.* 87, did not accompany the writ. But the motion was overruled. The defendant then pleaded the general issue.

At the trial before *Hubbard*, J. the plaintiff introduced evidence, showing that there were separate and distinct dams mentioned in the separate counts in his declaration, erected at different times, and carried away at different times. The evidence introduced by the plaintiff also tended to prove that those dams were unskilfully and insecurely erected.

The judge instructed the jury, that if the dams, or either of them, were not properly constructed, and were not made sufficiently secure to hold and retain the head of water retained by them, and the injury happened to the plaintiff from the defective construction of the dams, or either of them, the defendant would be liable for the losses and injuries which the plaintiff had sustained as the direct consequence of such defective construction.

The following verdict was returned: "The jury find for the plaintiff, on the second count in the plaintiff's writ, and assess damages in $87·45; the jury cannot agree upon the first count in the plaintiff's writ."

The plaintiff then moved to discontinue, as to his first count, and the judge granted the motion. The jury then returned their verdict, generally, for the plaintiff, for the sum of $87·45.

The defendant's counsel excepted to the granting of the plaintiff's motion to discontinue as to his first count. They also filed a motion, that if the full court should decide that the plaintiff was rightly permitted so to discontinue, the defendant might be allowed his costs on the first count.

W. H. Whitman, for the defendant. The court has no jurisdiction of this case. Though the demanded damages exceed three hundred dollars, yet no affidavit was indorsed on the writ, or annexed to it, that the matter, sought to be recovered, exceeded that amount or value, as is required by *St.* 1840, *c.* 87. The writ, therefore, should have been dismissed *Hunt* v. *Inhabitants of Hanover*, 8 Met. 343.

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The action does not respect an easement in real estate, within the meaning of *St.* 1840, *c.* 87; and therefore this court has not jurisdiction of it. See 3 Kent Com. (5th ed.) 434–438. 8 Met. *ubi sup.* *Cary* v. *Daniels*, 5 Met. 236, and the authorities cited by the counsel for the defendant in that case. *Johnson* v. *Jordan*, 2 Met. 234, 239.

In order to give this court jurisdiction, on the ground that the action respects an easement in real estate, the easement must appear on the face of the declaration. 5 Met. *ubi sup.* In the present case, no such easement so appears; or if it does so appear, its validity is not necessarily involved in the decision of the case. The sole question was, whether the defendant's dam was skilfully built; not whether he had a right to build a dam. See *Turner* v. *Blodgett*, 5 Met. 240, *note.*

The defendant claims costs on the first count, under the Rev. Sts. *c.* 121, § 16, and the fourth rule of the court, (24 Pick. 384,) as to costs on amendments.

The defendant's objection to the discontinuance as to the first count was made by his counsel, before they had seen the case of *Hall* v. *Briggs*, 18 Pick. 503. Unless the court find a distinction between that case and this, the decision on this point will probably be for the plaintiff.

Beal, for the plaintiff. The declaration sufficiently shows that this is an action respecting an easement in real estate. The plaintiff alleges that he "had a right to the use of the water in Furnace Brook, for the driving of his mill, without molestation." This necessarily imports a right to the free and unobstructed flow of the water to his mill; and this is an easement. *Cary* v. *Daniels*, 5 Met. 236. *Crittenton* v. *Alger*, in Berkshire, September term 1846, (since published in 11 Met. 281.)

The Rev. Sts. *c.* 121, § 16, give the defendant costs only when there is a verdict for him on one of the counts.

W. Thomas replied.

Shaw, C. J. 1. The declaration substantially sets out an easement of the plaintiff in the defendant's land, and a

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disturbance, and is good after verdict. It states that the plaintiff was seized and possessed of a mill and mill site. His right to have the water flow freely to his mill, unmolested and unincumbered with dangerous materials wrongfully placed therein by the defendant, on his own land, was an easement; and such misuser, by the defendant, of his own right in another part of the stream, was a disturbance.

2. The court had full authority to allow the plaintiff to strike out one of his counts, before the verdict was recorded; and the terms of such amendment were wholly within the discretion of the court.

3. It is only where there is a verdict by the jury, on one count for the plaintiff, and on another for the defendant, that costs for the defendant are to be taxed, under the Rev. Sts. c. 121, § 16. In the present case, there was no verdict for the defendant.

Judgment on the verdict for the plaintiff.

JOSHUA B. TOBEY & others *vs.* PRESIDENT, DIRECTORS, &c. OF WAREHAM BANK.

Before there was any parochial organization in the town of Wareham, and while parochial business was transacted by the inhabitants of the town, in town meetings, the St. of 1825, c. 121, authorized the town to make sale of certain lands "originally appropriated for the support of the regular administration of gospel ordinances therein, and to be exclusively devoted to that purpose;" and directed that at the annual town meetings thereafter held in March or April, three or more persons should be elected trustees of the fund to be raised by such sale, who should invest the proceeds of the sale in some productive fund, and 'annually appropriate the income thereof, according to the original intention of said town when the lands aforesaid were laid out and appropriated:" In 1826 said lands were sold, and in 1827 and 1828, the town elected trustees, who invested the proceeds of the sale, as required by said statute: In February 1828, the first parish in Wareham was organized, and several other parishes were afterwards organized in Wareham: In 1828 and ever afterwards, said first parish annually elected trustees of said fund, to whom it was transferred, and who invested it, in the name of the "Trustees of the Ministerial Fund in Wareham," in shares in the capital stock of Wareham Bank, and appropriated the income to the use of said parish: No trustees were elected by the town, after 1828, until 1844: In 1844 and the two following years, trustees were again elected by the town, and in 1846

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the town voted to request said trustees to collect the interest on the ministeria. fund and divide it among the several religious societies in the town, in proportion to their population; and said trustees brought an action against the Wareham Bank to recover the dividends declared on the aforesaid shares standing in the name of the "Trustees of the Ministerial Fund." *Held*, that the lands were holden by the town in its parochial capacity, and that the proceeds of the sale thereof were holden in the same capacity, until the separate organization of the first parish; that upon such organization of the first parish, the fund, in which those proceeds were invested, became the property of said parish, and were subject to its control; that the *St.* of 1825, *c.* 121, was not intended to change, and did not change, the legal character of the fund, and vest it in the town in contradistinction to the first parish; that the direction to the town to elect trustees was applicable to the town only while it acted in its parochial capacity; and that the parish, when separately organized, had the sole authority to elect trustees to manage the fund; and that the action could not be maintained.

The omission of a parish, for one year, to elect parish officers, does not necessarily operate as a dissolution of the parish; and if it did, the parish property would not therefore vest in the town, although the town held the property, in its parochial capacity, before the parish was separately organized.

When different persons claim the dividends on bank stock, the ownership of which is in dispute, and the directors of the bank promise one of the persons to pay him interest on the dividends, upon their being left in the bank, and he afterwards brings an action against the bank for the dividends, and fails to recover them, because the stock was proved to be the property of another person, he cannot recover the interest that was promised to him; such promise being without consideration.

ASSUMPSIT, to recover four dividends declared by the defendants on thirty five shares of their capital stock, standing in the name of the "Trustees of the Ministerial Fund in Wareham."

At the trial before *Hubbard*, J. the plaintiffs showed, by the records of the town of Wareham, that, at the annual town meeting in March 1844, Joshua B. Tobey, Peter Mackie, Jedediah Briggs, John Galt and Osier Howard were chosen trustees of the ministerial fund; and that they were again chosen at the annual town meeting in March 1845. The plaintiffs also read, from said records, a vote of the town, instructing these trustees to collect the interest due on said fund, and appropriate it to pay expenses, and invest the balance in good notes: Also a vote authorizing the trustees to apply to the legislature for a statute confirming an equitable distribution of the income, arising from said funds, among the different religious societies in said town: (It was admitted that no such statute had been passed.) Also a vote

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passed January 24th 1846, authorizing the trustees to collect the dividends due upon said fund from the Wareham Bank, and to bring a suit for the same, if the bank should refuse to pay: Also a vote authorizing the town treasurer to hire the sum of $420 for paying expenses in collecting said dividends: Also a vote of the town, passed April 25th 1846, that the town trustees collect the interest due on the ministerial fund, and divide it among the several religious societies in the town, in proportion to their population.

The plaintiffs gave in evidence certificates of thirty five shares of the stock of Wareham Bank, dated November 10th 1835, signed by the president and cashier, to "the trustees of the ministerial fund in Wareham." The cashier of the bank testified that the stock was transferred, by William Fearing, Sylvanus Bourne and Peter Smith, to the then trustees of the fund, and that he delivered the certificates to said Bourne, and that all the dividends on said stock, previously to April 1844, had been paid to said Bourne, who gave his receipt for the same, as chairman of the trustees; and it appeared that said Bourne, as treasurer of the first parish in Wareham, credited these dividends in the parish books, and paid them to the minister of the parish.

The plaintiffs relied on *St.* 1825, *c.* 121, authorizing the town of Wareham "to make sale of certain lots of woodland and meadow in said town, originally appropriated for the support of the regular administration of gospel ordinances therein, and to be exclusively devoted to that purpose," and also directing the town thereafter to elect annually, in March or April, three or more persons, to be "trustees of the fund to be raised by the sale aforesaid," and to invest the proceeds of said sale, and "annually appropriate the income thereof, according to the original intention of said town, when the lands and meadows aforesaid were laid out and appropriated;" and that the trustees should "give bond to said town, for the faithful performance of their duties." The plaintiffs also claimed interest on a portion of the dividends sued for, by virtue of a paper, dated June 9th 1845, purporting to be a

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vote of the directors of the bank. And a former cashier of the bank, called as a witness by the plaintiffs, testified that said vote was passed at a meeting of the directors, when a majority were not present; that he did not record it, but that he gave the original paper to the trustees, promising to allow them interest. This testimony and the introduction of the paper were objected to by the defendants, but the objection was overruled.

The defendants gave evidence that certain lands and meadows in the town of Wareham, originally laid out to the use of the ministry, had been, until they were sold in 1826, under the aforesaid *St.* of 1825, *c.* 121, called, known and occupied as ministerial property, and that the use of them had been appropriated to the support of the congregational minister of said town; that there was only one religious society, to wit, the congregational, in the town, until 1828, and that the town acted under one warrant, in town meetings, in its municipal and parochial capacities, until 1828; that in 1826, upon the petition of the town for authority to sell said lands and meadows, calling them parish property, the legislature passed the aforesaid *St.* of 1825, *c.* 121; that in the autumn of 1826, the said lands and meadows were sold, and that the town, in 1827 and 1828, elected trustees, as required by said statute.

The defendants then introduced the proceedings in the organization of the first parish in Wareham, in February 1828. And it appeared by the records of said parish, that the parish had chosen trustees of the ministerial fund, in February 1828, and annually afterwards, in March or April; and that, in 1829, Bartlett Murdock, Benjamin Fearing, William Fearing, Isaac Pratt and Eliphalet Bumpus were chosen such trustees: That the parish, on the 5th of October 1829, voted to authorize the treasurer of the town to cancel the bond given, as required by the aforesaid statute, by the trustees; that the securities should be delivered into the hands of the trustees of the parish; and that said trustees should give bond to the treasurer of the parish.

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The following receipt, found among the papers of the present town treasurer, was then given in evidence: "Wareham, June 14th 1830. Received of Peter F. Briggs, treasurer of Wareham, $3611·11, it being the whole amount of the property belonging to the town of Wareham, called the ministerial fund, principal and interest, to 4th December 1829.

William Fearing, } Trustees of
Eliphalet Bumpus, } said fund."

The defendants then gave evidence that the interest of said fund was appropriated to the use of the first parish, by the trustees, who paid it to the parish treasurer; that Sylvanus Bourne was first chosen, by the parish, one of the trustees of the fund, in 1831, and annually afterwards till 1844, and acted in said capacity; that he was treasurer of the parish during most of that time; that he, in 1835, with the consent of the other trustees, invested the funds in thirty five shares in the stock of Wareham Bank, and that the aforesaid certificate of said stock was then issued and delivered to said Bourne, who held it as trustee, or treasurer of said parish, till 1844, when he delivered it to Joshua B. Tobey, after said Tobey had been chosen one of the trustees of the town: That said Bourne, from the time of the purchase of said stock, received all the dividends declared thereon, and signed the dividend book, as "chairman of trustees," or "chairman," and, in one instance, in his own name alone; and that he, as treasurer of the parish, appropriated the dividends, so received, to the minister of the parish — a small part being applied to parish purposes: That said Bourne was not chosen trustee by the town, and that the town, after 1828, chose no trustees, until 1844, in which year the parish also chose trustees, at their meeting on the 29th of April.

It did not appear in evidence, that from the passing of said *St.* of 1825, *c.* 121, (on the 3d of March 1826,) till the year 1845, the trustees chosen by the parish ever executed any bond, either to the town or to the parish, for the faithful discharge of their duties.

It appeared that in 1844 a written application, signed by

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twelve persons, was made to a justice of the peace to organize the first parish in Wareham; that said justice issued his warrant, dated March 1st 1844, calling a meeting of the parish on the 9th of said month; that a meeting was held, on that day, at which no trustees were chosen; and that this meeting was dissolved, after a vote had been passed designating the manner in which future meetings should be called. The plaintiffs objected, that this was an organization of a new parish, and not of the first parish, and that all subsequent proceedings were the proceedings of such new parish. They also objected, "that there was not now any congregational parish in Wareham, except as involved in the town, which has the power to act parochially; the first organization of the parish having become extinct." These objections were overruled.

The defendants gave in evidence a vote of the parish, passed on the 29th of April 1845, authorizing the trustees, chosen by the parish, "to demand and receive all the papers and evidence of property belonging to said parish, and to demand and recover the interest on dividends which have accrued on said funds, and to take all legal measures necessary in the premises, and also defend the same." The defendants also showed, that on the 5th of January 1846, they paid $420 — the full amount of dividends then due — to said trustees chosen by the parish, and took from said trustees a bond of indemnity; and that said sum had been applied, by said trustees, to parish purposes.

It was admitted that there were several organized parishes in Wareham, and that the officers of each of them had demanded, from the trustees chosen by the town, their portion of the income of the ministerial fund.

A nonsuit was entered, subject to the opinion of the whole court. If any of the judge's rulings were wrong, in any material point, the nonsuit to be taken off, and a new trial had, or the defendants to be defaulted, as the court shall determine.

Coffin, for the plaintiffs.

Beal & S. Miller, for the defendants.

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DEWEY, J. The great question in the present case is that which arises upon the construction of the *St.* of 1825, *c.* 121. The bank shares, which are the subject of the present controversy, are the proceeds of the sale of certain ministerial lands in the town of Wareham; not directly, however, inasmuch as the funds, whilst held by the town, were vested in other securities; and it was only subsequently to the passing over of those securities, and by a new investment by the trustees of the parish, that the bank shares were purchased. This fact of the purchase of the shares by the trustees of the parish, and not of the town, might present an objection to a recovery against the present defendants; but in the view we have taken of the case, neither this objection, nor that taken to the election of the trustees of the town, or their capacity fully to enforce any claim of the town to these funds, has been deemed material. We think, upon the broader ground, the general question as to the corporate body which is to have the appointment of the trustees, and the control of the funds arising from the sale of the ministerial lands in Wareham, the case is clearly with the defendants. Originally, these lands vested in the town of Wareham, though appropriated "to the support of the regular administration of gospel ordinances." But they vested in the town in its parochial capacity. Every town was a corporation of that peculiar character, that it embraced, within the scope of its appropriate duties, those of a parish, until a separate parish was formed and organized within its limits. *Brunswick* v. *Dunning*, 7 Mass. 445. Under this authority, it was formerly the usage of the towns to transact their parochial business at the regularly called town meetings; making no difference, in this respect, whether acting on parochial subjects, or on matters of strictly municipal concern. *Austin* v. *Thomas*, 14 Mass. 338. The principle is now well settled, that where lands are holden by the town in its parochial capacity, the proceeds of the sale of such lands are also holden by the town in the like capacity; and upon the separate organization of a parish, the parish succeeds to all the parochial property of the town

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This doctrine is fully stated and sustained in the cases of *Ludlow* v. *Sikes*, 19 Pick. 317; *Shrewsbury* v. *Smith*, 14 Pick. 297; and *Inhabitants of Milton* v. *First Congregational Parish in Milton*, 10 Pick. 447.

These authorities would entirely dispose of the question as to which corporation — that of the town or the parish — has the property and control of the proceeds of the lands holden by the town of Wareham in its parochial capacity, were it not for the further objection which is supposed to vary the case, and which arises from the provisions of the *St.* of 1825, *c.* 121. The first section of that statute authorizes, in general terms, the town of Wareham to make sale of certain ministerial lands. The second section authorizes the said town, at the annual meeting of its inhabitants, in March or April, to elect three or more persons, "who shall be the trustees of the funds to be raised by the sale aforesaid." Does this statute perpetuate the legal estate and control of these funds in the town of Wareham, irrespective of any change that might take place by the organization of the parish distinct from that of the town? We think such was not its design; nor does a proper construction of it necessarily lead to that result. This statute is to be construed with reference to those well known and established principles, already stated, that towns acted in the double capacity of municipal and parochial corporations, and that parochial property passes from the town tc the parish, connected with the fact, that at the time of the enactment of this statute no separate organization of a parish had taken place. The authority of the town to sell these lands, and invest the proceeds thereof, was only equivalent to an authority to the first parish in Wareham. It was virtually an authority to act parochially in relation to these funds. The town of Wareham was to elect three or more trustees annually, to manage these funds, so long as they represented the parish; but upon the separate organization of the first parish of Wareham, this duty would devolve upon the parish, as directly connected with the appropriation of these funds. We cannot suppose the legislature intended by this statute —

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apparently a mere enabling statute, authorizing the change of certain parochial property from real estate to personal — to change also the whole legal character of these funds, and to enact that they should forever be legally vested in the town, in contradistinction to the first parish. It is much more reasonable, and much more in accordance with our whole system of the tenure of parochial property, to consider the provision, as to the annual election of trustees by the town, to have been exclusively applicable to the town, while continuing to act in a parochial capacity, and that, upon the organization of a separate parish, not only the income of the funds was to be appropriated, from time to time, by the parish, but also that the legal estate and entire control of the property passed to the parish.

The effect of this opinion is, therefore, that these funds, the subject of the present controversy, did, upon the separate organization of the first parish in Wareham, become the property of the parish, and were subject to its control; and that the trustees to manage the same are to be elected by the parish, and not by the town.

This view of the case settles the principal question between the parties before us.

We do not perceive that the result is at all affected by the two minor points raised on the argument. It will not avail the plaintiffs to establish, if they could do so, that the parish, after being duly organized in 1828, and continuing so until 1844, through some neglect, failed to elect their annual officers in the year 1844. Such omission does not necessarily operate as a dissolution of the parish. *Oakes* v. *Hill*, 14 Pick. 442. The property vested in the parish by their organization in 1828, and the town ceased to have any control over the same after that period.

The vote of the directors of the Wareham Bank, that "the bank would allow interest at the rate of six per cent. *per annum*, on the dividends due on these shares of the bank stock until the majority of the directors vote to the contrary, and notify the town trustees," does not vary the case.

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There are various objections to the legal effect or binding force of this vote of the directors. 1. It appears to have been adopted at a meeting attended by less than a major part of the directors. 2. It is no direct promise to pay the principal sum sought to be recovered in this action, but only the interest on the dividend; and to whom this is payable is equivocal; all the stipulation, in reference to the "town trustees," being that the interest should be paid until the directors "notify the town trustees that they would no longer allow interest on said dividend." 3. But the more weighty objection is, that it can have no effect, for want of any legal consideration. So far as it is a promise to the plaintiffs, it is upon the assumption that the shares belonged to the plaintiffs, and that, as such holders, they were entitled to any interest that might be allowed on dividends not called for. But it now appearing that the shares were in fact the property of the defendants, and they alone entitled to the dividends accruing thereon, there is no equitable or legal consideration for such promise to the plaintiffs. *Nonsuit confirmed.*

ABNER S. TAYLOR *vs.* COUNTY COMMISSIONERS OF PLYMOUTH.

Under the Rev. Sts. *c.* 39, § 57, which provide that a party, who is dissatisfied with the estimate, made by county commissioners, of the damages caused by taking land for a rail road, "may apply for a jury to assess the damages, either at the same meeting at which such estimate shall be completed and returned, or at the next regular meeting thereafter," if a party applies for a jury, at the same meeting at which the estimate is completed and recorded, and a jury is then ordered, and a warrant therefor issued, he cannot, by merely omitting or refusing to proceed under that order and warrant, entitle himself to a jury on applying therefor at the next regular meeting of the commissioners.

THIS was a petition for a mandamus, to be directed to the county commissioners of Plymouth, commanding them to pass an order for summoning a jury to estimate the damage done to the petitioner by the Old Colony Rail Road Corporation, by taking his land, and constructing their road upon it

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The petitioner alleged, in his petition, that said commissioners, on his application, assessed his damages, sustained by the construction of said rail road, at $300, and caused their assessment and award to be recorded at their regular meeting on the first Tuesday of August 1846; that he immediately made known to the commissioners, in writing, his dissatisfaction with their assessment and award, and applied to them, in writing, that his damages, so sustained, might be estimated and found by a jury; and that the commissioners, at their regular meeting aforesaid, passed an order that a jury be summoned for the purposes before mentioned; "that it was not convenient, by reason of sickness and affliction, to cause a jury to be summoned and to give their verdict, within three months next after the time of passing said order, and a jury was not summoned, and no verdict was agreed upon or rendered by a jury, in the premises; whereupon the petitioner applied to said commissioners, at their regular meeting at Plymouth, on the first Tuesday of January 1847, being the next regular meeting of said commissioners, after the said award and assessment of damages was made and recorded by them, as before mentioned, praying them that said order for a jury might be renewed, or a new order passed for summoning a jury in the premises, for the purposes mentioned in his original application for a jury, as aforesaid;" that said commissioners caused notice of said last application to be given to said Rail Road Corporation, and appointed a time for hearing the parties thereon, and after a full hearing thereon, of both parties, said commissioners refused to order a jury to be summoned upon said application, and ordered that the petitioner take nothing thereby.

The county commissioners filed an answer to said petition, averring that, at their meeting in August 1846, they passed the order mentioned in said petition, and caused a warrant to be issued to the sheriff of Plymouth, directing him to summon and empanel a jury to assess the petitioner's damages in the premises, which warrant they then put into the hands of the petitioner, to be by him delivered to said sheriff:

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That the petitioner, at their next regular meeting in January 1847, returned said warrant to them, with no return thereon by said sheriff, but with an indorsement thereon, in these words: "In consequence of sickness in my family, and other circumstances conspiring to prevent getting through with the jury trial, within the three months prescribed by law, I return the papers and warrant for a jury, into the clerk's office, unexecuted. Abner S. Taylor." That, at said last mentioned meeting of the commissioners, the petitioner also presented to them a petition for another order and warrant for a jury to assess his said damages; but that they, believing that they had no authority to grant said last mentioned petition, ordered that it be refused, and that the petitioner take nothing thereby.

Coffin, for the petitioner.

T. H. Russell, for the respondents.

Dewey, J. The right to a jury to assess the damages occasioned by the laying out of a rail road is given by Rev. Sts. c. 39, § 57. The application for such jury is to be made either at the same term at which the estimate of the county commissioners shall be completed and returned, or at their next regular meeting thereafter. The petitioner made his application for a jury, in due season, being at the term when the estimate of damages was returned by the commissioners, and a jury was then ordered, and a person appointed to preside at the hearing of the case before the jury. The warrant for such jury was duly made out and delivered to the petitioner, who wholly neglected to cause any further proceedings to be had thereon within three months from the date of the order for a jury. He now demands, as a matter of right, a second order for a jury. His second application, having been made at the next term after the estimate of damages by the county commissioners was returned, was in due time, as an original application, and, if not barred by his previous application and the order thereon, ought to be granted. The case, therefore, opens the inquiry as to the effect of the first order and warrant for a jury. The petitioner contends that no jury having in fact been called out in pursuance of it, it

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may be treated as a nullity, and his second application for a jury be considered as an original one. This view of the case does not seem to us to be a reasonable one. Some effect should be given to the first petition and the order thereon. The petitioner may select either of the periods named in the statute for filing his petition for a jury; but whenever filed, it requires action on the part of the county commissioners, and notice to the rail road corporation, and the corporation may appear and request the appointment of a presiding officer at the hearing before the jury, and such appointment may be made, and all the preliminary arrangements thus settled. The case having proceeded thus far, we do not think the petitioner, at whose request the jury has been ordered, can arbitrarily discontinue all further proceedings on such order, without affecting his right to make a new application for a jury.

Various cases may occur where the party would be entitled to a new jury. By force of the Rev. Sts. *c.* 24, § 35, it is so, when a jury, upon being called out, shall not agree on a verdict; and if, for any error, the proceedings are set aside upon a writ of *certiorari*, the party may have a new jury. To these cases may be added, generally, all others, where a verdict has failed to be returned, by some inevitable casualty, or the fault of some public officer charged with the execution of the process. If the person appointed to preside should, by reason of sickness or absence from the Commonwealth, or by declining to serve, thereby prevent the hearing before the jury, it might furnish a proper reason for a new warrant and order for a jury. Other cases might be mentioned, which might produce a like effect.

When such cases occur, a new petition is to be presented setting forth the reasons for not proceeding on the origina order, and praying for a new one. We understand, in the present case, that no sufficient reason was shown to exist for not executing the first order, and that it was neglected to be executed at the will of the petitioner, and for no good cause. The petitioner contends that he had the legal right, at his

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pleasure, to omit all further action on the first warrant, and demand, as of right, a second order for a jury. This, we think, he was not authorized to do. Having elected to take his order for a jury, at the meeting of the commissioners when they returned their estimate, he was bound to proceed thereon, unless he shows a good excuse therefor. The fact alleged as an excuse was of a character that was to be considered and adjudged upon, as to its existence, by the commissioners. We do not understand it to be suggested that there was any real incapacity of the party, disabling him from proceeding under the first warrant. We think the case not a proper one for a mandamus to the county commissioners.

Petition dismissed.

ROBERT G. SHAW & others *vs.* BENJAMIN D. FINNEY.

H., a broker, whose business was to buy and sell fish, as well for himself as for others, was authorized by S. & Co. to buy fish for them, and bargained with F. for a quantity of fish, intending to buy for S. & Co., but not intimating to F. that he was not buying for himself, and made this written memorandum of the bargain: "October 21st 1846. F. agrees to sell H. his fare of fish, at $2·50 per quintal, as they lay, or to go on flakes one good day, at $2·62½; and to have the refusal of them until Friday evening, 23d instant:" H. gave notice to F., before Friday evening, that he would take the fish at $2·62½, they to be put on flakes one good day: F. refused to deliver the fish to H., and S. & Co. brought an action against F. for breach of the bargain. *Held*, that the case was within the statute of frauds, and that the action could not be maintained.

THIS was an action of assumpsit to recover damages for breach of an alleged contract to deliver certain quintals of fish to the plaintiffs.

At the trial in the court of common pleas, before *Ward*, J. the plaintiffs, to prove the contract, called B. Hathaway as a witness, who testified that he resided in Plymouth, and was in the business of buying and selling fish for himself and others; that in the year 1846 he had bought eleven thousand quintals, three or four thousand for himself, and the rest for the plaintiffs; that for the two preceding years he had bought

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large quantities of fish, one half for himself, and one half for others; that in the autumn of 1846, he was authorized, in writing, by the plaintiffs, to buy fish for them, and that, on the 21st of October 1846, he went to Eel River, (in Plymouth,) where the defendant resided, and there treated with him for his fish, which lay in a storehouse, and the precise quantity of which was not ascertained; that he then and there intended to buy for the plaintiffs, and made an arrangement with the defendant, which he, immediately after, on the same day, but not in the defendant's presence, minuted on his memorandum book, as follows: "Benja. Finney agrees to sell B. Hathaway his fare of Truro fish, at $2·50 per quintal, as they lay, or to go on the flakes one good day, at $2·62½, and to have the refusal of them until Friday evening, 23d instant:" That thus having the refusal until the 23d evening, and being called to Boston on the 23d day, he sent T. S. Perkins to the defendant, to notify to him that he would buy the fish at $2·62½; that in the evening, on his return from Boston and the return of Perkins from Eel River, and his report, he (Hathaway) made this memorandum on his book: "Friday, Oct. 23 '46. I have employed T. S. Perkins, this day, to go to Eel River, to tell Benja. Finney that I will take his fish, as per agreement of Wednesday the 21st; and Mr. Finney states that all is satisfaction. B. Hathaway for R. G. Shaw & Co:" That, on the next day, he went to the defendant's house, but did not find him, and left there a letter for him; that in a week or fortnight afterwards, when the price of fish was rising, he called on the defendant, at his house, and the defendant then refused to deliver the fish, saying that he (Hathaway) did not come himself, on the 23d, as he ought to have done; that he (the defendant) did not know Perkins; that he wanted to know whom he sold to, and who was responsible.

The said Hathaway further testified, that he was a broker, but did not remember that he told or intimated to the defendant that he was acting for any one else, and not for himself, until he saw him about a fortnight after the sale. He

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also testified that he believed there were about eight hundred quintals of fish in the lot which he contracted for.

T. S. Perkins testified that he went to Eel River, for Hathaway, on the 23d of October 1846, and saw the defendant, with whom he had no personal acquaintance, and told him that Hathaway would take the fish at $2·62½, they to be put on flakes one good day; that, if he would let Hathaway know when they were ready, he would send and take the weight; that the defendant said he would consider the bargain closed at this price; that when he left the defendant, he was requested by him to tell Hathaway to come up the next day, as there were so many tricks of the trade; and that he then asked the defendant if he considered it a sale. and he said he did.

Upon this evidence, the judge ruled, that the statute of frauds furnished a defence to the action, and a verdict was taken for the defendant. The plaintiffs alleged exceptions to the ruling.

Coffin & W. Davis, for the plaintiffs. As Hathaway was a broker, he was authorized to sign the contract for both parties; and thus the statute of frauds (Rev. Sts. *c.* 74, § 4) does not apply to the case. Chit. Con. (4th Amer. ed.) 317. *Clason* v. *Bailey*, 14 Johns. 484. *Penniman* v. *Hartshorn*, 13 Mass. 87. *Rucker* v. *Cammiyer*, 1 Esp. R. 105. The defendant, living in the same town with Hathaway, who had done extensive business, as a broker, in buying fish, must have known that he was a broker, and was buying for others.

The defendant might have maintained an action against the plaintiffs, on the strength of Hathaway's memorandum. See *Thomson* v. *Davenport*, 9 Barn. & Cres. 78. *Allen* v. *Bennet*, 3 Taunt. 169. Sugd. Vend. (1st Amer. ed.) 70.

The defendant ratified the contract by his declarations to Perkins. *Soames* v. *Spencer*, 1 Dowl. & Ryl. 32.

Beal & W. Thomas, for the defendant. A broker, in this Commonwealth, has no greater authority than any other agent, and is not, as such, authorized (as an auctioneer may perhaps be) to sign the name of both parties to a contract of

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sale. In England, brokers cannot legally buy or sell for themselves; and their duties are prescribed by statute. Paley on Agency, (2 Amer. ed.) 15.

Wilde, J. The question is, whether the alleged contract of sale is proved by the evidence reported. The evidence is, that B. Hathaway, a witness for the plaintiffs, made an agreement with the defendant, on the 21st of October 1846, for the purchase of his fish, and entered a memorandum thereof in his book, as follows: "Benja. Finney agrees to sell B. Hathaway his fare of Truro fish at $2·50 per quintal, as they lay, or to go on the flakes one good day, at $2·62½, and to have the refusal of them until Friday evening, 23d instant." Hathaway testified that he was a broker, and was in the business of buying and selling fish for himself and others, and that he was authorized to purchase fish for the plaintiffs, and that these fish were intended by him to be purchased for them. But he admits that he did not intimate to the defendant that he was acting for any other person, and not for himself, until after the agreement.

On this evidence, it is contended for the plaintiffs, that this was a contract between them and the defendant, and that, although Hathaway was employed by the plaintiffs only as their agent, yet when the defendant dealt with him, he became his agent also, and that his memorandum of the agreement took the case out of the statute of frauds, which provides that "no contract for the sale of any goods," &c. "for the price of fifty dollars or more, shall be good or valid, unless" (among other things) "some note or memorandum in writing be made and signed by the party to be charged thereby or by some person thereunto by him lawfully authorized." Rev. Sts. c. 74, § 4. Cases were cited from the English authorities, as to similar contracts made by brokers; but these authorities are not applicable to the present case. A broker, in England, is a known legal public officer, governed by statute; and those who deal with him are to find out who his principals are. He cannot act as principal, without violating his oath; and he is also liable to a penalty, if he does. 1 Tomlins's Law Dictionary, 274.

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Hathaway was engaged in buying and selling fish, as well for himself as for others; and it does not distinctly appear whether this purchase was made wholly for the plaintiffs, or not. But however this may have been, the defendant did not deal with Hathaway as a broker or agent, but as the contracting party; and if the defendant had himself signed the first memorandum, he would not have been liable in this action by the plaintiffs; for the contract was, in terms, a contract with Hathaway. *Exceptions overruled.*

STEPHEN CURTIS *vs.* THOMAS J. GARDNER.

A., the owner of land, with a mill privilege, grist mill and dam thereon, made an oral agreement, with B. and C., to build a saw mill on said land and dam, one half by A. and the other half by B. and C., and to use the same jointly, until it should run down; and the saw mill was built and used, according to said agreement, for several years, when A. conveyed to D. his land, grist mill and dam, "and also one half the saw mill, with all the appurtenances and privileges to the said half saw mill belonging; the said saw mill being in common and undivided with B. and C., owners of the other half, who have the privilege of using the same, in equal shares with the said D., until it shall run down:" and D. conveyed to E. the said land, with all his right, title and interest in and to the grist mill and saw mill standing thereon, "being the same premises conveyed by A. to said D.:" A., after the death of B. and C., conveyed to their heirs "one half of a saw mill, being in common and undivided with D., and being the same that said A. reserved to B. and C. in his deed to D.:" E. refused to permit said heirs to use the saw mill, and they brought a real action to recover possession of a moiety thereof. *Held*, that the deed from A. to D. reserved to B. and C. only a life estate in the land on which the saw mill stood, and that the action could not be maintained.

THIS was a writ of entry, to recover "one eighth part of a messuage" in Scituate, to wit, a saw mill, wheel, wheel floors, saws, right of taking water from the pond adjoining, and other privileges and appurtenances thereto belonging. The tenant pleaded the general issue, (nul disseizin,) and filed a specification of defence, asserting title in himself, and denying title in the demandant.

At the trial before *Hubbard*, J. the parties agreed that Elijah Clap 2d was the owner of a tract of land, lying partly

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in Hanover and partly in Scituate, upon both sides of a brook which divides those towns, and of a water privilege, dam and grist mill thereon; that in August 1815, said Clap and Peleg Curtis and Joseph Curtis built a saw mill on said dam, which was the same mill mentioned in the demandant's writ; that said Clap paid one half, and said Peleg and Joseph the other half, of the expenses of said mill; that it was repaired by them in the same proportions, until said Clap conveyed his estate in the premises to Edward Curtis, by deed dated December 9th 1831; that said deed conveyed eight and a half acres of land, describing it by metes and bounds, and contained the following clauses: "A part of which is now covered by the pond, together with the mill dam, the grist mill, with the wheel, floom, and the appurtenances and privileges to the said grist mill belonging. Also one half the saw mill, with one half the wheel, floom, saws, and all other appurtenances and privileges to the said half saw mill belonging; which said dam and mills are standing on said premises; with all other privileges and appurtenances to the same belonging. The said saw mill being in common, and undivided, with Peleg and Joseph Curtis, (owners of the other half,) who have the privilege of using the same in equal shares with the said Edward, until it shall run down, and taking water for that purpose, when it is not wanted for the use of the grist mill."

It was admitted or proved, that after the abovementioned conveyance was made to Edward Curtis, he and Peleg and Joseph Curtis had the use of the saw mill in alternate years commencing January 1st 1832; that in 1832 and 1834, said Edward used and repaired the saw mill, and that said Peleg and Joseph used and repaired it in 1833; that said Joseph died intestate, on the 9th of November 1834, and that, in the inventory of his estate, one fourth of said saw mill was put down as real estate; that said Peleg died on the 22d of June 1835, having devised his estate, *first* to his wife for life, *secondly* one moiety to his son Philip for life, then to Philip's wife for life, and the other moiety to the widow of his son

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Stephen for life, and *thirdly* one moiety of the estate to the children of Stephen deceased, and the other moiety to the children of Philip; that the saw mill was used by the Curtises and their heirs, during the year 1835; and that, on the 26th of June 1835, Edward Curtis conveyed to Thomas J. Gardner (the tenant) the aforesaid eight and a half acres, together with all his right, title and interest in and unto the saw mill and grist mill standing thereon — being the same premises that were conveyed by Elijah Clap 2d to said Edward Curtis.

It appeared that said Elijah Clap 2d, on the 19th of October 1835, conveyed to "the heirs of Peleg and Joseph Curtis" (but not naming them) "one half of a saw mill, with one half of the wheel, floom, saws and all other appurtenances and privileges to the said half saw mill belonging, being in common and undivided with Edward Curtis, and it being the same that I, the said Clap, reserved to said Peleg and Joseph Curtis, in my deed to said Edward Curtis — reference to be had to the same for a more particular description."

It also appeared that on the 23d of September 1836, the widows of Joseph Curtis and Peleg Curtis, by deed of that date, conveyed to Thomas J. Gardner (the tenant) all their right, title and interest in and to the mill built by Elijah Clap 2d and Peleg and Joseph Curtis, for the sum of $80; he paying all bills of repairs since 1833.

It appeared that the widows of Peleg and Joseph Curtis confirmed the deed and agreement aforesaid, of September 23d 1836, by a deed, made by them on the 6th of October 1836, conveying to said Gardner (the tenant) one undivided half of the saw mill, with the privileges and appurtenances, referring, in said deed, to Clap's deed of December 9th 1831.

It also appeared that the tenant was in possession and use of the saw mill in 1836, and has been ever since; that the widow of Peleg Curtis died on the 14th of December 1845, and that in the division of said Peleg's real estate, in 1846, his share of said saw mill was set to Stephen Curtis (the demandant) and to H. J. Curtis.

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It was agreed by the parties, that said Elijah Clap — being released from his covenants, by the tenant — would testify, if such testimony be competent, "that in 1815 he made an oral agreement with Joseph and Peleg Curtis to build a saw mill on his land and dam, the same to be built, half by him and half by them, and to be improved by them jointly until it should run down, and taking water for that purpose from his pond, when it was not wanted for the grist mill to grind twelve bushels of grain; and that when said saw mill should run down, the said Joseph and Peleg should contribute to him one half the expense to make the dam as good as it was before the saw mill was built; and that, in 1831, he told Joseph Curtis that the mill was no profit to him, and that he should put no more repairs upon it; that he should let it go down."

Upon the foregoing facts, the judge advised a nonsuit, which was entered, subject to the opinion of the whole court.

P. Simmons, for the demandant.

J. H. Loud & Clifford, for the tenant.

Wilde, J. At the trial of this cause, it was agreed by the parties that Elijah Clap 2d was the owner of a tract of land, including the demanded premises, and that, in August 1815, he, with Peleg and Joseph Curtis, built the saw mill, described in the demandant's writ, on a dam crossing a stream within said tract of land. Afterwards, in 1831, said Clap conveyed the said tract of land, with one half of said saw mill, to Edward Curtis, reserving the other half by the following clause in the deed: "The said saw mill being in common and undivided with Peleg and Joseph Curtis, (the owners of the other half,) who have the privilege of using the same in equal shares with the said Edward until it shall run down, and taking water for that purpose when it is not wanted for the use of the grist mill."

Whatever might be the intention of the parties to this conveyance, it is very clear, that nothing was reserved in the land but an estate for life, during the lives of the said Peleg and Joseph Curtis, and the life of the survivor; and as both have since deceased, the demandant's title, who claims under

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them, fails. It is true that only one half of the saw mill was conveyed to Edward Curtis, and the other half has been conveyed to the heirs of Peleg and Joseph Curtis, of whom the demandant is one. Whether they have a right to a half of the mill, considered as personal property, and, if they have, what remedy they may have against the tenant, if he should refuse to suffer them to occupy, are questions not to be decided in the present case. But as to the title to the land, the rule of law is inflexible. To create an estate of inheritance by deed, except by a deed to a corporation, and one or two other special exceptions not applicable to this case, the land must be conveyed to the grantee *and his heirs;* and no words of perpetuity will supply the omission of these necessary words of limitation. A grant to a man to have and to hold to him forever, or to have and to hold to him and to his assigns forever, will convey only an estate for life. Lit. § 1. 2 Crabb on Real Property, §§ 955, 956. *Wright* v. *Dowley*, 2 W. Bl. 1185. *Gould* v. *Lamb*, 11 Met. 86. And the same rule applies to words of reservation or exception. If the reservation had been to Clap and his heirs, for the use of Peleg and Joseph Curtis, until the mill should run down, that would have been the reservation of a determinable estate in fee; but the words "his heirs" are as essential in the reservation of such an estate, as in that of an absolute fee simple

Nonsuit confirmed.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF NORFOLK, NOVEMBER TERM 1847, AT DEDHAM.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. SAMUEL S. WILDE, } JUSTICES.
HON. CHARLES A. DEWEY, }

JAMES MARSHALL & others *vs.* ISAAC N. CREHORE & another.

Under the Rev. Sts. *c.* 103, a joint tenant or tenant in common, though disseized, may maintain the process of petition for partition, if he has a present right of entry, as he might under the previous statutes.

Before the passing of *St.* 1850, *c.* 278, a respondent, in the process of petition for partition, had no remedy for the improvements which he or those under whom he claimed might have made on the premises of which partition was sought.

THIS was a petition for partition of land in Dorchester, and was submitted to the court upon the following statement of facts, which was agreed for the purposes of this case only:

"Mary Marshall died unmarried and intestate in the year 1830, leaving the real estate described in the petition unincumbered by debts or mortgage. She left neither parent,

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brother nor sister living at the time of her decease. She formerly had two brothers; John, who died more than sixty years ago, and it is not known that he left any children; and Josiah, father of the petitioners, who died about thirty years ago, leaving ten children, viz. Josiah; Mille, who married Jesse Holmes; Polly, who married David Lakins; Stephen, Elisha, and John; Sally, who married Joseph McLean; and the three petitioners, James, Isaac and George. Three of the children of the said Mary's brother Josiah died in her life time; to wit, Josiah, jr., Elisha, and Sally McLean; and two of them, to wit, John, and Polly Lakins, since said Mary's decease. In the year 1831, Stephen, one of said Josiah's sons, conveyed his right, by a quitclaim deed, to Jesse Holmes, who married said Josiah's daughter Mille; said Holmes having before obtained the shares of John, and of Polly Lakins. Afterwards, in the same year, said Holmes, and Mille his wife, conveyed the whole in fee simple, with warranty, to Edward Crehore, who immediately took possession thereof, and afterwards conveyed one half thereof to Isaac N. Crehore, (the respondent,) and subsequently conveyed the other half to him in mortgage; and the said Edward and Isaac N. have been in undisturbed possession, and have held exclusive possession of the premises ever since; and said Edward and Isaac N. made improvements, and erected a building or buildings thereon, and have ever since claimed the absolute title thereto, and ownership of the entire premises."

Richardson, for the petitioners.

Wilkinson & Safford, for the respondent.

Shaw, C. J. The title of the petitioners to three sevenths of the described estate seems established by the facts agreed. Mary Marshall died seized within twenty years, intestate, unmarried, without parent or brother or sister, but leaving, as her heirs, the children of a deceased brother, of whom ten survived their father, but seven only survived the said Mary, and were her heirs, taking one seventh each.

The defence is, that the respondents have disseized the

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petitioners, by having taken a conveyance in fee, with covenants of warranty, from four of the heirs and tenants in common of the whole estate; under which they have entered and held exclusive possession, sixteen or seventeen years, claiming title to the whole, and made improvements and betterments.

Assuming that a conveyance, by one tenant in common, of the entire estate, to a stranger, in fee, with warranty, and an entry under it by the grantee, claiming the whole, is to be regarded as a disseizin of the cotenant, the question is, whether the cotenant thus disseized, having a right of entry, can have this process for partition.

The case of *Barnard* v. *Pope*, 14 Mass. 434, is in point for the petitioners, and must, we think, govern the case, unless it has been overruled or modified by subsequent decisions, or by the revised statutes, changing the law under which that case was decided. That case was like the present, in this, that some of the tenants in common made a conveyance of the whole, to the exclusion of the petitioner, who proved his right as tenant in common, under which conveyance the respondent entered, claiming the whole estate, and held exclusive possession. It was held, that a tenant in common, though out of possession, and technically disseized, having a present right of entry, might maintain this process. The court remark upon the case of *Bonner* v. *Proprietors of Kennebeck Purchase*, 7 Mass. 475, in which, in a very brief report, it was stated, that an actual seizin was necessary. That general rule had, in the mean time, in effect, been overruled by *Wells* v. *Prince*, 9 Mass. 508, in which it was held that proof of title as tenant in common, and a right of entry, were sufficient. 4 Dane Ab. 742, 743. This was affirmed in Maine. *Baylies* v. *Bussey*, 5 Greenl. 157. In *Rickard* v. *Rickard*, 13 Pick. 251, it was held that an adverse possession, by one tenant in common, against another, continued over twenty years, was a bar to a petition for partition. This affords an implication, that if the right of entry still remained, the process would lie. The same rule is substantially adopted

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in other States, though there is some difference in the terms of their statutes regulating partition. *Smith* v. *Burtis*, 6 Johns. 215. *Clapp* v. *Bromagham*, 9 Cow. 530. *Lloyd* v. *Gordon*, 2 Har. & M'Hen. 260. *Call* v. *Barker*, 3 Fairf. 320. The general result of the cases seems to be, that when the right of the party is not barred by lapse of time, by descent cast, or otherwise, this process lies.

No judicial decision has occurred to affect the authority of *Barnard* v. *Pope;* on the contrary, cases have occurred which imply that the law, as there decided, is correct.

The remaining question is, whether the law has, in this respect, been altered by the revised statutes. An argument for the respondents was founded on the difference of phraseology between the revised statutes and the old statute, on which the case of *Barnard* v. *Pope* was decided. The Rev. Sts. *c.* 103, § 1, provide that "all persons holding lands as joint tenants, coparceners, or tenants in common, may be compelled to divide the same;" and by § 2, "any one or more of the persons so holding lands may apply, by petition, for a partition of the same." The language of *St.* 1783, *c.* 41, § 1, is, "that any person *interested with others, in any lot, tract of land*, or other real estate, making application," &c. may have partition. The argument, an ingenious and plausible one certainly, was, that the words of the earlier statute were large enough to embrace the case of persons having rights and interests in land without actual seizin; but that the revised statutes intended, by the term "holding," to restrict the remedy to the case of persons actually seized, with others, as tenants in common, and to exclude this remedy, if the petitioner had been disseized, at the time of the application. But we think that such was not the object and purpose of the revised statutes, nor is such the legal construction and effect of them. The word "land," in the revised statutes, imports every species of real property; and we think the word "hold" does not limit its operation to the case of a seizin *de facto* and actual possession, but well applies, in its legal significance, to lands of which one has a good title

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with a present unconditional and unqualified right of entry. That such was the sense in which it was understood in the revised statutes, and intended to be used, may reasonably be inferred from the other provisions in the same code, in which it is provided that one, having such title and right of entry, may, without an actual entry, bring a real action, and count on his own seizin.

But to consider this not upon the mere effect of the words "holding lands," but on a more general view of the revised statutes, it may be proper to examine them somewhat more at length. There is no one department of the law, in which the revised statutes have made alterations more radical and extensive, than that of the law of real property, both as it regards the rights of property, and all the remedies for asserting and protecting them. They have taken away the writ of right, all writs of formedon, and all other real actions, except the writ of entry, and that in its simplest form, in which the demandant counts on his own seizin, and a disseizin by the tenant, leaving all the modes by which title can be acquired, transferred or lost, to be matter of proof, to be determined by the established rules of law. The right of action and the right of entry are made coëxtensive, subject to the same limitation of twenty years, with the usual exceptions and saving clauses, in case of disability; and a right of entry is made equivalent, in such writ of entry, to an actual seizin. Rev. Sts. *c.* 101. (See commissioners' notes.) These large alterations in the law of real property, and the remedies respecting it, must be kept in view, in construing the provisions of the revised statutes upon collateral and kindred subjects, adopted at the same time, of which partition is one. Rev. Sts. *c.* 103. The commissioners, by their note, (*in loco*,) indicate what was their purpose, in these provisions. They remark, that the provincial statutes, and also the *St.* of 1783, *c.* 41, seem to have been intended to furnish an amicable remedy, where there was no dispute as to titles, or as to other material facts; that this was soon changed by *St.* 1786, *c.* 53 providing for the trial of all controverted questions, by which

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in effect, this process by petition was converted into an adversary suit. But as this was done indirectly, and, as it were, unintentionally, the statute regulations on the subject were few and incomplete. The commissioners then declare, that in this title they have endeavored to supply this defect, that is, to adapt all the details of proceeding to the actual character of the process, that of trying and adjusting all controverted titles and questions of fact, necessarily arising under it, as an adversary proceeding. In accomplishing this purpose, they avow that they have been governed by the opinions and judgments of the courts, in the practice under the existing statutes, and aided by the revised code of New York. The decisions hereinbefore cited, including *Barnard* v. *Pope*, had been made before the revised statutes were framed, and were among those alluded to. It cannot, therefore, be reasonably concluded that it was the intention of these commissioners, by the use of the word "holding," to take away a beneficial remedy from a tenant in common, technically disseized, but who had a good title and a present right of entry.

But we think the general tenor of *c.* 103 indicates that it was intended to make this proceeding, by petition for partition, to a much greater extent than formerly, an adversary proceeding, to try and decide controverted questions of title, and make it, to a much greater extent, binding and conclusive upon parties and privies, and this, not as to the possession only, but as to the title. Sect. 33 provides that the final judgment shall be conclusive as to all rights, both of property and of possession, of all parties and privies to the judgment, including all persons who might by law have appeared and answered to the petition, with certain limited exceptions. Considering that a judgment, on petition for partition, is to have this binding effect upon titles, very ample provisions are made for giving more effectual notice to parties interested, and providing for disabilities of absence, infancy, coverture and the like, and in case of eviction by either of the tenants from his property, for a new partition, betterments, and for recovering back of money paid for equality of partition

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Whether, therefore, we look at the avowed purpose of the commissioners, or at the various new provisions which they have proposed, and which have been adopted and sanctioned by the legislature, the court are of opinion that it was not intended to alter the law, so far as to bar one, who has title as a tenant in common or joint tenant, with a present right of entry, from having this process by petition for partition. We think it was rather their intention to adapt it to the purpose of trying controverted questions of title, and making the judgments under it binding, in all cases where one claims and can maintain his title and right of entry against any one controverting that title and claim, in whole or in part, and whether such adverse title is maintained by the respondent, on the ground of documentary title, disseizin, adverse possession, or otherwise.

One argument for the respondents, and one which had weight with the court, was this; that if the tenant in common, being disseized, were compelled to resort to his writ of entry, the tenant would have a remedy for his improvements; whereas, under a petition for partition, he cannot. This may be a consequence, which would be inequitable, and may not have been foreseen by the legislature; but we think it cannot alter what is otherwise the obvious construction of the statute.

If the law, as it now stands, does not provide any mode for securing to a respondent, who has entered under a title supposed to be good, the benefit of his improvements, it is for the legislature, if they judge it expedient, to extend the law of improvements to cases of partition, either by authorizing commissioners to make partition so as to give the respondent that part of the common estate, on which his improvements are made, if practicable, deducting the value of them from the aggregate value of the estate to be divided, or by assessing the value of the improvements on the whole estate, and making the share, payable by either, a lien on his property, or otherwise.*

* By St. 1850, c. 278, it is provided that a respondent, in a petition for

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But perhaps a more decisive consideration is, that if a tenant in common, who is thus disseized, cannot have his petition for partition, but must resort to his action, he has only to make an actual entry. The case supposes that he has a right of entry. This entry, therefore, would be lawful, and no action of trespass would lie against him, supposing, as in most cases the fact would be, that he can enter without actual force. He is then a tenant in common in possession, actually holding with the other cotenants, and no exceptions could be taken to his petition for partition. To decide, therefore, that one disseized could not have partition by petition, would not much tend to secure to the respondent his improvements.

Judgment that partition be made, as prayed for.

JOSEPH HARRINGTON *vs.* NELSON CURTIS.

C. and H. settled an account, in which C. had charged H. with large sums, and had also credited him with large payments in cash, leaving a balance against H., and proposed to advance to H. a further sum, and take H.'s note on time, secured by a mortgage, for a certain amount, which included such balance and such further sum, and agreed with H., that if there were overcharges against him, in said settled account, they should be corrected: H. gave his note and mortgage accordingly, and the sum thus advanced by C. was added to the account, and the note was credited, and the account closed. *Held*, that upon proof of overcharges against H., in the settled account, he might maintain an action against C. for money had and received, and recover the amount of such overcharges.

SHAW, C. J. This was assumpsit for money had and received. The case, as it appeared on the trial before Mr. Justice Dewey, was briefly this: There having been large pecuniary dealings between the parties, they met and settled an account in March 1845. The defendant had made out an account against the plaintiff, charging and crediting large amounts, and making a balance due to himself, and thereupon

partition, shall be entitled to compensation for the value of any improvements; such value to be ascertained in the same manner as is provided for tenants in real actions, by the Rev. Sts. c. 101.

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offered to make to the plaintiff further advances, making together $2500, for which he proposed that the plaintiff should give him a note secured by a mortgage. The plaintiff objected to closing the settlement at that time, desiring to investigate the account, and alleging that there were various errors and overcharges in it. But the defendant agreed, if the plaintiff would then settle the account, and give the note and mortgage, that any errors and overcharges therein, if any should be found, should be corrected. Subsequently, the plaintiff brought this action for money had and received, and offered evidence to prove such overcharges. This evidence was admitted by the judge, and left to the jury, with instructions not excepted to, who found a verdict for the plaintiff.

The specific objection to the evidence, at the trial, and now made on the argument here, is, that as the defendant had not received money for the balance, but only a note on time, which has not yet been paid, he could not be liable for money had and received. This proposition, strongly supported, as it was, by the full argument for the defendant, we do not propose to controvert; but, under the circumstances, we think it does not apply to this case.

The account settled, the errors in which, if any, the defendant undertook to correct, embraced many items of credit by cash payments, and also a credit of the new note and mortgage. It was one entire account, all of which was then settled, and all of which was open for correction. Taking the whole together, the result was, that the defendant received of the plaintiff a given amount in cash and securities, and the event proved, that to a certain extent, he held them both without right, and contrary to good conscience. This included the money, as well as the securities, and constituted a case where, upon the common principle, assumpsit lies for money had and received.

According to the agreement, made by the parties at the trial, the verdict is to be amended by reference to an assessor.

J. J. Clarke, for the defendant.

Harrington & F. Hilliard, for the plaintiff.

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Sewall F. Belknap & others *vs.* Michael Gibbens & Trustee.

A single plaintiff cannot summon himself, nor can several plaintiffs summon one of their own number, as a trustee, in the process of foreign attachment: But the mere fact, that the name and addition of a plaintiff and of a trustee are the same in the writ, does not show that they are one and the same person; and therefore the court cannot legally dismiss the action, upon motion: The identity of the plaintiff and trustee should be pleaded in abatement, in order that it may be traversed, and tried as a question of fact.

Since the *St.* of 1837, *c.* 210, went into effect, a plaintiff, who sues out the process of foreign attachment, and attaches the property of the principal defendant, may proceed with the suit against him, although all the trustees are discharged, if the service on such defendant was made by reading the writ to him, or by delivering to him a copy thereof, attested by the officer who served it, or by leaving such copy for him at his dwelling-house or last and usual place of abode.

This was an action of debt upon an award, and was commenced in the court of common pleas. The plaintiffs were Sewall F. Belknap of Windsor, (Vt.) Eliab Gilmore of Concord, (N. H.) and John A. Carpenter of Dedham in this county, copartners. The writ was in the common form used in the trustee process, and alleged that said Gibbens had not, in his own hands, goods and estate, &c. but had "trusted to and deposited in the hands of John A. Carpenter of said Dedham, Rail Road Builder, trustee of said Gibbens, goods, effects and credits," &c. The writ was duly served on said Carpenter and the service on Gibbens, the principal defendant, was thus returned by the officer: "By virtue of this writ, I attached a chip, as the property of the within named Michael Gibbens, and at the same time I summoned him to appear and show cause at court, by leaving, at his last and usual place of abode, an attested copy of this writ."

The person summoned as trustee was defaulted. The principal defendant appeared and moved that the action should be dismissed, whereupon the court of common pleas ruled that said action could not be maintained, as against said trustee, by reason of his being plaintiff in said action, nor as against the principal defendant, by reason of insufficient service upon him, and ordered the action to be dismissed.

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The plaintiffs excepted to said decision.

Ely, for the plaintiffs.

Wilkinson, for the defendant.

Shaw, C. J. The motion to dismiss the action was placed on two grounds, and sustained by the court of common pleas. 1. That Carpenter, one of the plaintiffs, was summoned as trustee — the only trustee named in the writ. 2. That such plaintiff, as trustee, being discharged, as the defendant insisted he must be, there was no such service as would warrant the court in proceeding against the principal defendant; that is, no such service of the writ on him, as would be sufficient in an action commenced in the ordinary mode of process. Rev. Sts. *c.* 109, § 10.

On the second of these grounds, it is contended that when, under the trustee process, there is a separate attachment of the goods of the defendant, there must be a separate summons left with the defendant, pursuant to the provisions of the Rev. Sts. *c.* 90, §§ 39, 41; whilst, on the other hand, it is maintained, that these provisions do not extend to the trustee process, which constitutes a distinct system, governed by its own rules; and that the writ is to be served on the principal defendant, as heretofore, by reading the original summons to the defendant, or by delivering a copy to him personally, or leaving it at his last and usual place of abode. Rev. Sts. *c.* 109, § 8. The latter mode would have been good, prior to the revised statutes, under *St.* 1794, *c.* 65, § 1, and was the mode universally adopted in practice. It may have been altered by the revised statutes, or not. It seems to depend on this: The direction is (Rev. Sts. *c.* 109, § 8,) that the trustee writ "shall be served on the principal, and on each of the trustees, in the manner prescribed for the service of an original summons, in other civil actions." If this latter clause referred to the mode of serving an original summons, as it existed before the revised statutes, it would be clear that a service by copy, and not a separate summons, would be sufficient. If it referred to the mode prescribed in the same code, (Rev. Sts. *c.* 90, §§ 3, 4,) it would be a more difficult

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question. We are not aware that the commissioners have intimated, in their report, any intention to alter the law in regard to the service of trustee writs. If such an alteration has been made, it is important to be known and understood; as it may affect the validity of a separate attachment of property, other than that in the hands of one or more trustees. But we have not thought it necessary to give an opinion upon this question.

Nor have we thought it necessary to express an opinion upon another question, considered in the argument, to wit, whether a plaintiff can summon himself, or whether several plaintiffs can summon one of their own number, as a trustee. It is, as far as we know, a novel experiment. The theory of the trustee suit, the provisions for securing the relative rights of plaintiff and trustee, the rights of appeal, and the general tenor of the law, seem to regard the suit, as between plaintiff and trustee, as an adversary proceeding, and to bring the case within the rule, that a person cannot sue himself, or be plaintiff and defendant in the same case. *Mainwaring* v. *Newman*, 2 Bos. & Pul. 120. The ingenious argument for the plaintiff goes mainly on the ground, that the trustee process is in the nature of process *in rem*, and therefore it is quite immaterial whether the estate and effects to be affected by the attachment are in the hands of the plaintiffs, or one of them, or in those of a third person. This is true in regard to that branch of the statute which is designed to reach goods or chattels, so deposited that they cannot be reached by the ordinary process of attachment; but, in such case, it is wholly unnecessary, because the plaintiff, holding any such goods, which are attachable, can deliver them to the attaching officer; as every trustee is obliged to do on execution, when he is charged on that ground. It is upon the other branch of the statute, affecting "credits," that the difficulty arises, where the purpose is to charge the trustee as the debtor of the principal defendant. The trustee is regarded as in some measure in privity with the principal defendant, and guardian of his rights. If, in his view, the judgment, charging him

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as trustee, is erroneous, and injurious to the principal defendant, it is his duty to appeal and take the opinion of this court. But, in the present case, it would be an appeal by Carpenter, trustee, from a judgment in favor of Carpenter and others, he being one. Again; if he fail to pay over on execution, a *scire facias* must be brought by Carpenter and his partners, to compel him to pay the debt out of his own effects. In theory of law, it is an adversary suit; there is a conflict of rights between the plaintiff and trustee, bringing the case within the ordinary rule in regard to opposing parties. *Eastman* v. *Wright*, 6 Pick. 316. *Moffatt* v. *Van Mullingen*, 2 Chit. R. 539, and 2 Bos. & Pul. 124, *note*. *Thayer* v. *Buffum*, 11 Met. 399.

But, without deciding these questions, the court are all of opinion that the action ought not to have been dismissed. No sufficient ground for such dismissal appears on the face of the writ and return. On the contrary, all appears regular — the service on a trustee, and the trustee defaulted. It does not appear, and it cannot appear, without evidence *aliunde*, that the John A. Carpenter, one of the plaintiffs, and the John A. Carpenter, the trustee, are one and the same person. Nor can such evidence be given, without a plea in abatement or in bar. A motion to dismiss is in the nature of a demurrer, and can only be sustained when the grounds clearly appear on the record and returns. *Nye* v. *Liscombe*, 21 Pick. 265. *Simonds* v. *Parker*, 1 Met. 511. The fact, that the plaintiff, Carpenter, and the person summoned as trustee, are one and the same person, and that, by reason thereof, there was no sufficient service on the principal defendant, was matter of abatement, and should have been pleaded, if relied upon, in order that the truth of such fact might have been traversed and tried, in the only mode in which a question of fact can be tried.

If it be said, that if the fact be really so, that the plaintiff and trustee are the same person, and the objection of a want of a plea in abatement is merely a technical one, the answer is, that when the defendant has been actually served with a copy of the writ, and the attachment of a chip is returned,

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but no separate summons left, the objection is the merest matter of form, and that a good technical answer may avail, to a technical objection. Nor is this without precedent. When it was notorious that the chief justice of the court of common pleas was plaintiff in a suit in his own court, and the writ, not having been changed from the usual printed form, bore test of his own name; because it did not appear from the record that the plaintiff and the chief justice, in whose name the writ bore test, were the same person, the court refused to arrest the judgment. *Prescott* v. *Tufts*, 7 Mass. 209. So where the writ was tested in a manner not conformable to the constitution, it could not be taken advantage of, because it was not pleaded in abatement. *Ripley* v. *Warren*, 2 Pick. 592.

It being too late to plead in abatement, the order of this court is, that the exceptions of the plaintiffs to the decision of the court of common pleas, dismissing the plaintiffs' action, be sustained, the said judgment set aside, and the cause remanded to the court of common pleas, for further proceedings.

This case came again before the court, at October term 1848, and the parties submitted the questions formerly raised, upon an agreement that Carpenter, the plaintiff, and trustee, was one and the same person.

Shaw, C. J. The court are of opinion that the trustee must be discharged, for the reasons intimated when the case was formerly before us.

The question recurs, upon the sufficiency of the service to warrant a judgment against the principal defendant, after the discharge of an only trustee. And the court are inclined to the opinion, that the provisions of Rev. Sts. *c.* 90, §§ 3, 4, 39, 40, 41, directing the service of an original summons with an order to attach goods, and requiring a separate summons to be left, do not apply to the service of trustee writs. But we

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think the matter is set at rest by *St.* 1837, *c.* 210, § 1, (not cited at the former argument,) which provides, that "trustee writs shall hereafter be served upon the principal defendant and trustee, respectively, in the same manner as is now by law provided for the service of an 'original summons without attachment' in the thirty ninth section of the ninetieth chapter of the revised statutes." By referring to Rev. Sts. *c.* 90, § 39, we find the direction to be, that "when there is an original summons without attachment, the summons shall be served by reading the same to the defendant, or by delivering to him a copy thereof, attested by the officer who serves it, or by leaving such copy for him," as afterwards directed in § 41, to wit, "at his dwelling-house, or last and usual place of abode." If there was room for doubt on the revised statutes, we think this removes it, and that the service on the principal defendant, in the present case, was sufficient to render him amenable, although the only trustee named in the writ was discharged.

The plaintiffs may therefore proceed in their action against the principal defendant.

HERVEY NASH *vs.* JAMES BROPHY & Trustee.

The test of a writ may be amended in any stage of a cause, by substituting the name of the first justice of the court, who is not a party, in place of another name erroneously inserted.

When a single trustee is summoned in the process of foreign attachment, and is described, in the writ, as of a town in the county in which the action is brought, and he comes in and alleges, in his answer, that he was not an inhabitant of that county, when the suit was commenced, but of another county, and that he had not, when the writ was served, any goods, &c. of the principal defendant in his hands, the court cannot, upon the motion of the principal defendant, dismiss the action upon the ground that it was brought in the wrong county.

When the principal defendant, in a process of foreign attachment, is a creditor of a firm, and not of the individual members of it, and one only of the firm is summoned, or named in the process, as trustee of such defendant, and he states in his answer that the debt due to such defendant has been paid to him unconditionally, since the service of the process, he cannot be held as trustee.

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The writ, in this case, was dated June 27th 1845, and was returnable at the following September term of the court of common pleas. The plaintiff resides in this county, and the principal defendant in Middlesex. John Kinnin, the only person who was named as trustee, in the writ, was described as of Quincy in this county, and the writ was served on him, by reading it to him, in Quincy. Kinnin made no appearance at the return term, but the principal defendant then appeared, and filed an account in offset, and procured a continuance. At the next term, (December 1845,) Kinnin appeared by attorney, and by his attorney answered as follows: "That at the time of the service of said writ on him, he was not an inhabitant of Quincy, nor had he ever been, or ever had his domicil in said Quincy; but, at the time of said service on him, he was resident in Kingston, in the county of Plymouth, though, for a few weeks prior, he had been a resident, for a temporary purpose, in the State of Maine; and that he had no goods, effects or credits of said Brophy in his hands at the time of the service of said writ." At the same December term, the principal defendant appeared by attorney, and filed a motion to dismiss the action, because it appeared by the said Kinnin's answer, that said Kinnin, at the time of the service of the writ on him, was resident and had his domicil in Kingston in the county of Plymouth, and not in the county of Norfolk, and so the writ was not legally returnable to the court of common pleas in Norfolk. The principal defendant also, at the same term, moved the court to dismiss the writ, because it bore test of John M. Williams, and not of Daniel Wells, chief justice of said court. The plaintiff thereupon moved for leave to amend, by substituting the name of said Wells for that of said Williams. This motion was granted, and the amendment made.

At April term 1846, Brophy called up his motion to dismiss the action, because Kinnin was not a resident in Norfolk, and offered to prove, by the papers on file, and by oral testimony, that said Kinnin's residence was as stated in his aforesaid answer; but the court refused to admit the evidence, and

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overruled said motion. To this ruling the principal defendant excepted. At the same April term, said Kinnin filed a sworn answer, stating that he had no goods, effects or credits of said Brophy in his hands, at the time of the service of said writ on him, and submitting himself to examination on oath. He also averred that he did not dwell in Norfolk, at the time of the service of the writ, but in Kingston, and prayed to be discharged. The plaintiff propounded interrogatories to said Kinnin, from his answers to which it appeared that, at the time of the service of the writ on him, he was partner with William Flyn; that the partnership name was Kinnin & Flyn; that the firm owed Brophy a note payable to him, and not to his order, which note Kinnin & Flyn afterwards paid to said Brophy, unconditionally and without any agreement, act or word, as to the future disposition of the amount. The court of common pleas discharged said Kinnin, and the plaintiff appealed to this court.

The plaintiff had a verdict, in the court of common pleas, against the principal defendant, and the case came into this court, upon his exceptions aforesaid, and the plaintiff's appeal aforesaid.

E. Ames, for the plaintiff.

Arad Moore, for the defendant and trustee.

Shaw, C. J. The allowance of the amendment of the writ, so as to make it bear test of Daniel Wells, instead of John M. Williams, as chief justice, was right, and fully authorized by the Rev. Sts. c. 100, § 20. The test is a mere matter of form. *Ripley* v. *Warren*, 2 Pick. 592.

The motion to dismiss the action, because brought in the wrong county, was rightly overruled. The trustee was described as of Quincy in the county of Norfolk. *Prima facie*, therefore, the writ was properly returnable in that county; and there was no error, apparent on the record, to warrant a dismissal of the action on motion. Whether the trustee might have come in, at the first term, and have pleaded, in abatement of the writ, the matter stated in his answer, viz. that he was not resident in the county when he was summoned, is not now in question, because he has not so pleaded.

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We think Kinnin was rightly discharged on his answer; he being indebted to the principal defendant, as one only of a firm, and the partner not being named nor summoned. And he answers, that the debt was unconditionally, and without indemnity, paid by the firm. *Jewett* v. *Bacon*, 6 Mass. 60, 62. The trustee, therefore, is discharged, with costs.

Such a service having been made on the principal defendant, as would be sufficient to charge him in an action commenced by the ordinary process, the plaintiff has a right to proceed in the suit against him, in the same manner as if no trustee had been summoned.

ROBERT PORTER *vs.* COUNTY COMMISSIONERS OF NORFOLK.

Though an original petition for a jury to assess damages caused by the taking of land for a rail road is not seasonably filed, if it be after the regular meeting of the county commissioners next following that at which they completed and returned their estimate of such damages, yet if such petition be filed at the same meeting at which they complete and return such estimate, and they thereupon, without notice to the rail road corporation, pass an order and issue a warrant for the summoning of a jury, and the warrant is not served, they are authorized, and ought, upon motion of the land owner, though the motion be not made until after their next regular meeting, to issue an order of notice to the rail road corporation to show cause why a jury should not be summoned on the original petition; the first order for a jury being void, for want of such notice, and the original petition being still pending.

PETITION for a writ of mandamus, commanding the county commissioners of Norfolk to pass an order for a jury to revise the estimate, made by said commissioners, of the damages caused to the petitioner by the taking of his land, &c. by the Stoughton Branch Rail Road Company, or for such other relief to the petitioner as law and equity may require.

The facts set forth in the petition, and not denied, were these: On the 4th of July 1844, before the adjournment of the regular meeting of the county commissioners, appointed to be held on the fourth Tuesday of June in that year, the Stoughton Branch Rail Road Company petitioned the said

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damages, in case of rail roads, may be made at the same meeting at which the commissioners return their estimate, or at their next regular meeting. And by § 56, commissioners are to estimate damages "in the manner provided in the case of laying out highways." By Rev. Sts. c. 24, § 14, in case of highways, application for a jury to assess damages may be made at the meeting of the commissioners, at which the highway is laid out, or at their next regular meeting, or at any time not exceeding six months thereafter. The "six months," after the meeting succeeding that at which the commissioners' return of damages is made, (it is submitted,) is applicable to rail roads, according to the provisions of c. 39. But if the court hold otherwise, yet the present petitioner is entitled to an order of notice on his first petition.

B. Rand, for the respondents. The petitioner's remedy is lost by lapse of time. The "six months," in Rev. Sts. c. 24, § 14, were not extended to rail roads, by c. 39; and an application for a jury, in case of rail roads, can be made only at the commissioners' meeting at which the estimate of damages is returned, or at their next regular meeting.

Dewey, J. The petition for a jury, filed with the county commissioners at their regular meeting in June 1845, as an original petition, was not filed in due season; the Rev. Sts. c. 39, § 57, limiting the application to the meeting at which the estimate of damages by the commissioners shall be completed and returned, or at the next regular meeting thereafter.

It is contended that the application may be made within the period of six months, as in case of an application for a jury to assess damages in the location of a highway. But though the general course of proceedings is similar, in relation to a jury in the two cases, yet, upon this point, the cases differ, and a different statute provision exists. The only question, therefore, in the present case, arises upon the application for further proceedings upon the original petition filed at the proper term, and upon which a jury was ordered, but never called out by the petitioner. If such order had been a legal one, and a warrant had been duly issued thereon, and

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commissioners to estimate the damages caused to said Porter, (the petitioner,) by the location of their rail road. On the 26th of December 1844, said commissioners, at their regular meeting, awarded $1000 to said Porter, and caused their estimate to be completed and returned. Said Porter, being dissatisfied therewith, immediately petitioned the said commissioners, in writing, for a jury. Whereupon they, at the same meeting, without any notice to said Rail Road Company, ordered a jury; and on the 8th of January 1845, their clerk, without any special application therefor, made out a warrant for a jury, and gave it to the sheriff, who, at the end of three months, returned it to the clerk's office unserved.

Both said petitions were continued, from term to term, to the June term of said commissioners' court, in 1845, at which last term, within six months from said commissioners' award aforesaid, but after an intervening regular term in April 1845, said Porter filed a new petition, in writing, for a jury to estimate his damages. The petition was continued to September term 1845, when said Porter, by his counsel, made a motion, in writing, to have an order of notice issue on his original petition for a jury, (which was filed on the 26th of December 1844, then pending in said commissioners' court,) to said Rail Road Corporation, to show cause why a warrant should not issue thereon; but said commissioners refused to issue any such notice. An order of notice was issued on said second petition, filed at June term 1845, returnable on the 27th of October 1845, at which time both parties appeared, and said commissioners refused to order a jury.

Wilkinson, for the petitioner. The order passed in December 1844 was of no validity, for want of notice to the Rail Road Company. *Central Turnpike*, 7 Pick. 13. *Hinckley*, 15 Pick. 447. *Brown* v. *City of Lowell*, 8 Met. 172. And if the commissioners make an erroneous order on the petition, they should correct it. See *Inhabitants of Mendon* v. *County of Worcester*, 10 Pick. 235. *Ex parte Weston*, 11 Mass. 417.

By the Rev. Sts. c. 39, § 57, application for a jury to assess

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damages, in case of rail roads, may be made at the same meeting at which the commissioners return their estimate, or at their next regular meeting. And by § 56, commissioners are to estimate damages "in the manner provided in the case of laying out highways." By Rev. Sts. c. 24, § 14, in case of highways, application for a jury to assess damages may be made at the meeting of the commissioners, at which the highway is laid out, or at their next regular meeting, or at any time not exceeding six months thereafter. The "six months," after the meeting succeeding that at which the commissioners' return of damages is made, (it is submitted,) is applicable to rail roads, according to the provisions of c. 39. But if the court hold otherwise, yet the present petitioner is entitled to an order of notice on his first petition.

B. Rand, for the respondents. The petitioner's remedy is lost by lapse of time. The "six months," in Rev. Sts. c. 24, § 14, were not extended to rail roads, by c. 39; and an application for a jury, in case of rail roads, can be made only at the commissioners' meeting at which the estimate of damages is returned, or at their next regular meeting.

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It is contended that the application may be made within the period of six months, as in case of an application for a jury to assess damages in the location of a highway. But though the general course of proceedings is similar, in relation to a jury in the two cases, yet, upon this point, the cases differ, and a different statute provision exists. The only question, therefore, in the present case, arises upon the application for further proceedings upon the original petition filed at the proper term, and upon which a jury was ordered, but never called out by the petitioner. If such order had been a legal one, and a warrant had been duly issued thereon, and

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the petitioner, without any sufficient cause, had neglected to call out the jury, he would thereby be taken to have waived his right to a jury; as was held in *Taylor* v. *County Commissioners of Plymouth*, (*ante*, 449.)

Upon examining the records of the doings of the county commissioners, upon the original petition, it is quite apparent that no legal order was ever made, ordering a jury thereon. Such order could only be made after due notice to the corporation, or, what is equivalent, an appearance by them. *Central Turnpike*, 7 Pick. 13. *Hinckley*, 15 Pick. 447. The order being thus wholly illegal, no duty devolved upon the petitioner to call out the jury, in pursuance of such order; and he might properly treat it as a nullity. The proper order, upon the original petition, has not been made, viz. an order of notice upon the corporation to show cause why a jury should not be ordered upon the petition. That order it is yet competent for the county commissioners to make. The case is still pending, and the subject of any proper order. If it has not been duly brought forward upon the docket of that tribunal, it may be so now. The petition is undisposed of, and the further proceedings necessary to assess damages by a jury may yet be had thereon.

We think the proper order here will be, that an alternative mandamus issue to the county commissioners of Norfolk, requiring them to issue an order of notice to the Stoughton Branch Rail Road Company to appear before them and show cause why a jury should not be ordered upon the original petition of said Robert Porter, or that said county commissioners show cause for not so doing.

ROBERT PORTER *vs.* GILES G. LEACH.

Under the Rev. Sts. *c.* 97, §§ 74–76, when an execution is delivered to an officer to be served, and the person who is the debtor therein delivers to the officer an execution against the person who is creditor therein, the officer cannot justify a refusal to set off the one against the other, by making a return that he had due

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notice of an assignment of the first execution, at the time when it was put into his hands, and therefore could not set off the one against the other: To justify the officer in refusing to make the set-off, it should appear, by his return, or otherwise, that the execution first delivered to him had been lawfully and in good faith assigned to another person, before the creditor in the second execution became entitled to the sum due thereon.

TRESPASS for taking away and converting the plaintiff's wagon. The action was commenced before a justice of the peace, and went into the court of common pleas by appeal. In that court, the parties submitted the case upon an agreed statement of facts, on which a judgment was rendered, from which an appeal was taken to this court. The facts, as stated, were these:

On the 6th of July 1847, William H. Abbot recovered a judgment against the plaintiff, before a justice of the peace, for $20 damage, and $12·67 costs. A few minutes after said judgment was rendered, the plaintiff sued out a writ against said Abbot, which was served on the same day, and with a view, on the part of the plaintiff, of offsetting the execution, which he might get against Abbot. He procured a stay of execution on Abbot's said judgment, for fourteen days, and on the 13th of the same July recovered judgment against said Abbot for $3 damage, and $7·99 costs, and took out execution thereon, on the 15th of said July. On the 21st of said July, Abbot's execution was issued against the plaintiff, and was put into the hands of the defendant, a constable of Stoughton, and he, on the same day, demanded of the plaintiff payment thereof, who paid him the amount thereof, except $11·24, (the amount of the plaintiff's judgment against Abbot, and twenty five cents for his writ of execution,) and tendered to the defendant his legal fees, and put into his hands the plaintiff's said execution against Abbot, directed to the constables of Stoughton, and required the defendant to offset the balance of Abbot's execution. On the 2d of August following, the defendant demanded of the plaintiff the said balance of $11·24, on Abbot's execution against him, in money, which the plaintiff refused to pay; and thereupon the defendant seized the plaintiff's wagon on said

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execution, and sold it at auction, in due form, on the 6th of said August, for more than sufficient to pay said $11·24 and costs of levy, and paid to the plaintiff the overplus of the proceeds of the sale, and returned said execution satisfied. On the 23d of said August, the defendant made the following return on the plaintiff's execution against Abbot: "By virtue of this execution, I have made diligent search, and could find no property belonging to said Abbot, to the acceptance of the said Porter, within my precinct. At the receipt of said execution from said Porter, I had in my hands an execution of said Abbot against said Porter; but having had due notice of an assignment, at the time it was put into my hands I could in no way set off the one against the other, and therefore, not having been directed to take the body of the said Abbot, I return this execution in no part satisfied. Giles G. Leach, Constable of Stoughton."

E. Ames, for the plaintiff. By the Rev. Sts. *c.* 97, §§ 74, 75, the defendant was bound to set off the plaintiff's execution against Abbot, on being required by the plaintiff so to do; and on the plaintiff's tendering the defendant's fees, and demanding the offset of the balance, Abbot's execution against the plaintiff was discharged, and the defendant's subsequent proceeding thereon was a trespass. *Goodenow* v. *Buttrick*, 7 Mass. 140. *Jones* v. *Carpenter*, 9 Met. 509. The burden was on the defendant to show the validity of the assignment of the judgment. But he did not state, in his return, *when* the assignment, of which he says he had notice, was made. An assignment, by Rev. Sts. *c.* 97, § 76, prevents an offset, only when it is made lawfully, and in good faith, "*before* the creditor in the second execution became entitled to the sum due thereon."

A. L. Cushing, for the defendant. Notice of an assignment was given to the defendant, and he could not call a jury to decide on its validity. He did all that he knew how to do, and stated the assignment, in his return; and that is to be taken as true. See 3 Steph. N. P. 2042. *Briggs* v. *Wardwell*, 10 Mass. 356.

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WILDE, J. Upon the facts agreed, the court are of opinion that the plaintiff is entitled to judgment.

The defendant was bound to set off the amount of the plaintiff's execution, on Abbot's execution against him, unless it is made to appear, by his return on the plaintiff's execution, that such a set-off was not by law allowable. And this we think does not appear by the return. The return is, that at the receipt of the plaintiff's execution, the defendant had in his hands an execution of said Abbot against said Porter, but that having had due notice of its assignment, at the time it was put into his hands, he could in no way set off the one against the other. To justify the defendant, it should be made to appear, by his return, or otherwise, that Abbot's execution had been lawfully, and in good faith, assigned to another person, before the plaintiff became entitled to the sum due on his execution. This does not appear with sufficient certainty. The defendant might have had notice that an assignment had been made, although such was not the fact. And if an assignment had been made, it might not have been made in good faith, but for the purpose of defeating the plaintiff's right of set-off. Nor does it appear that the assignment was made before the plaintiff became entitled to the sum due on his execution, as the statute requires, in order to defeat his right of set-off.

It was argued for the defendant, that he had no means of ascertaining whether the assignment had been made in good faith, or not. But if so, his duty was to give notice to the plaintiff, and require from him a bond of indemnity, or he should have required the like bond from the party claiming under the assignment. But if, without requiring any bond of indemnity, and without sufficient evidence, the defendant undertook to decide against the plaintiff's right of set-off, and his decision was wrong, he must be responsible.

Judgment for the plaintiff.

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Stephen M. Weld *vs.* Nehemiah D. Williams.

A testator made the following devise: I give unto my wife M. and to my youngest son N., her only child, all that part of my real estate (described;) provided always, that if M. shall survive N., and N. die without issue, then I give said lands to M. for her life, and after her decease to my children, S., A., M. and C., and their heirs forever, in equal portions; provided always, that if my son N. shall survive my wife M., I give said lands to said N. and to the heirs of his body, and if he or they die without issue, then I give said lands to my children, S., A., M. and C., and to their heirs forever, in equal portions; provided always, that if my wife M. shall die before me, then I give said lands to my said son N. and to the heirs of his body; provided always, that if my son N. shall die before me, without issue of his body, then I give said lands to my wife M. for her sole use during her life, and after her decease I give the same to my children, S., A., M. and C., and to their heirs forever, in equal portions; provided always, that if my son N. die before me, leaving heirs of his body, then I give said lands to his said heirs, in the same manner, and on the like terms and conditions, as I have now given the same to my son N., either jointly with his mother, or to his own use, as events may prove; my meaning and intention being to give said lands to my said wife and my said son N., for their lives, and to the survivor of them, then to the children of said N., and in default of issue, then to my children, S., A., M. and C., and to their right heirs forever. If my said son N. should, at any time after my death and the death of his mother, be desirous of disposing of his interest in the lands devised to him in manner as aforesaid, my will is, that he should first offer the same to my eldest son, and if he refuse to purchase the same, then to my next son, and so on in succession; and if they all refuse to purchase the same, then he is at liberty to sell his interest in the same to whomsoever he may see fit.

The testator's wife M. and his son N. survived him, and N. survived M.: When the testator's will was made, N. was unmarried; but at the time of the testator's death, N. was married and had children, who were living at the time when he made the deed hereinafter mentioned: After M.'s death, N. offered the lands, devised as above stated, to the testator's elder sons, in succession, according to the testator's will, and they all declined to purchase the same: N. afterwards conveyed said lands to W., in fee simple, by a deed of warranty, in common form, with the usual covenants; and W. brought an action of covenant broken against N. *Held*, that the will gave N. an estate tail, and that he had authority, by the Rev. Sts. *c.* 59, § 3, to bar the entail by his deed to W., and that W. could not maintain the action.

This was an action of covenant broken. The plaintiff's declaration averred that the defendant granted and conveyed to the plaintiff certain lands in Roxbury, and covenanted that the defendant was lawfully seized thereof in fee simple, and had a good right to sell and convey the same to the plaintiff, his heirs and assigns. The breach alleged was, that the defendant was not lawfully seized, in fee simple, of said lands, and that he had no right to sell and convey the same to the

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plaintiff, his heirs and assigns. The defendant's plea averred that he was lawfully seized in fee, and had right to convey, &c.

The case was submitted to the court upon the following agreed statement of facts:

Joseph Williams, the father of the defendant, died, in the early part of the year 1822, seized of the premises described in the plaintiff's declaration. By his last will, dated March 21st 1814, (and ratified by sundry codicils, the last of which was dated December 16th 1818,) and proved before the judge of probate for the county of Norfolk, on the 4th day of June 1822, he devised the same premises, in the following clauses:

"Third. I give unto my beloved wife, Mary Williams, and unto my youngest son, Nehemiah D. Williams, who is her only child, all that part of my real estate which lies westerly of the Norfolk and Bristol Turnpike Road, and westerly of the run, commonly called Stony River, with the tenements, barns and out-houses thereon being; provided always, that if my dear wife shall survive my said son Nehemiah D. Williams, and he die without issue, then I give the said described lands and tenements to my said wife, and to be enjoyed by her for and during the term of her natural life; and after her decease I give the same to my children, Susan Williams, Amos A. Williams, George Williams, Martha Williams, Cumberland D. Williams and Nathaniel Williams, and to their heirs forever, in equal portions, share and share alike. Provided always, that if my said son Nehemiah D. Williams shall survive my dear wife, then I give my said son Nehemiah all the said described lands and tenements, and to the heirs of his body lawfully begotten; and if he or they die without issue lawfully begotten, then I give the same to my children Susan, Amos A., George, Martha, Cumberland D. and Nathaniel, and to their heirs forever, in equal portions, share and share alike. Provided always, that if my dear wife depart this life before me, then I give the same described lands and tenements to my said son Nehemiah, and to the heirs of his body lawfully begotten. Provided always, that if my son Nehemiah should depart this life before me, without issue of

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his body lawfully begotten, then I give the said described lands and tenements to my dear wife, for her sole use, for and during her natural life, and after her decease I give the same to my children, Susan, Amos A., George, Martha, Cumberland D. and Nathaniel, and to their heirs forever, in equal portions, share and share alike. Provided always, that if my son Nehemiah die before me, leaving heirs of his body lawfully begotten, then I give to his said heirs said lands and tenements in the same manner, and on the like terms and conditions, in all respects whatever, as I have now given the same to my said son Nehemiah, either jointly with his mother, or to his own use, as events may prove; my meaning and intention being, to give said described lands and tenements to my said wife and my said son Nehemiah, for their lives, and to the survivor of them; then to the children of said Nehemiah, lawfully begotten; and in default of issue, then to my children aforesaid, to wit, Susan, George, Amos A., Cumberland D., Martha and Nathaniel, and to their right heirs forever.

"Seventhly. If my said son Nehemiah should, at any time after my death and the death of his mother, be desirous of disposing of his interest in the lands and tenements herein devised to him in manner as aforesaid, my will is, that he should first offer the same to my eldest son, and if he refuse to purchase the same, then to my next son, and so on, in succession; and if they all refuse to purchase the same, then he is at liberty to sell his interest in the same to whomsoever he may see fit; and as a fair mode of estimating the value thereof, in case said Nehemiah wishes to sell the same, and either of my sons desires to purchase the same, or any part thereof, I recommend that three disinterested persons be appointed by the judge of probate for the county of Norfolk, to ascertain the value thereof."

Nehemiah D. Williams, mentioned in the above extracts from said will, is the defendant. His mother survived the testator, and died. At the date of said will, said Nehemiah was unmarried; but, at the time of the testator's death, said

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Nehemiah was married and had two children, who, with two others since born, are now living.

The estates devised have been successively offered to the sons of the testator, by said Nehemiah, and they declined to purchase the same.

On the 20th day of May 1847, the defendant, by deed of that date, duly executed and acknowledged, undertook to convey to the plaintiff, in fee simple, the premises described in the writ, for thirty thousand dollars. The deed was a common deed of warranty, containing covenants that the said Nehemiah was lawfully seized in fee simple of the aforegranted premises, and that he had good right to sell and convey the same to the said Stephen M. Weld, his heirs and assigns, as aforesaid.

On these facts, the parties agreed that if said deed vested in the plaintiff an estate in fee simple, then a nonsuit should be entered; otherwise, that judgment should be for the plaintiff.

W. Minot, Jr. for the plaintiff.

D. A. Simmons, for the defendant.

Shaw, C. J. This is an action of covenant, in which the plaintiff sets forth a conveyance made to him by the defendant, by warranty deed, in which the defendant covenanted that he was seized in fee of the granted premises, that he had good right and lawful authority so to convey the same in fee; with general warranty. It was agreed that if the deed of the defendant was sufficient to convey a good estate in fee to the purchaser, the plaintiff should become nonsuit. This agreement avoids the question whether, if the defendant himself was seized as tenant in tail, although by force of *St.* 1791, *c.* 60, his deed would vest a good estate in fee in the purchaser, his covenant that he was in fact *seized in fee* would not be nominally broken.

The question arises upon the will of Joseph Williams, the father of the defendant, all the material clauses of which are set forth in the agreed statement of facts.

It appears that the testator had been previously married;

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that at the time of making his will, and at his decease, he had six children of his former marriage surviving, to wit, Susan, Amos, George, Martha, Cumberland and Nathaniel. He had also a second wife then living, and by her one son, Nehemiah D. Williams, the defendant. He made his will in 1814, which was confirmed by several codicils, the last of which was executed in 1818. He died in 1822, and his will was duly proved in June 1822.

We will refer to some of the most important parts of this will.

He gives to his wife, Mary Williams, and his youngest son, her only child, Nehemiah, the premises in question; provided always, that if his wife shall survive said son, Nehemiah, and he die without issue, then the premises shall go to his wife for life, remainder to the six elder children named, in fee, as tenants in common. The first proviso was, that if his son Nehemiah survive the wife, then the premises should go to him and the heirs of his body lawfully begotten, remainder to the six elder children in fee. The second proviso was, that if the wife should die before the testator, then the premises should go to his son Nehemiah and the heirs of his body. The third proviso was, that if his son Nehemiah should die in the life time of the testator, and leave no issue, then the premises should go to the wife for life, remainder to the six elder children in fee. The fourth proviso was, that if his son Nehemiah die before the testator, leaving heirs of his body, then the premises should go to his said heirs, in the same manner as to his said son Nehemiah, either jointly with his mother, or to his own use, as events might prove. "*My meaning and intention* being, to give said described lands and tenements to my said wife, and my said son, Nehemiah, for their lives, and the survivor of them; then to the children of said Nehemiah, lawfully begotten; and in default of issue, then to my children aforesaid," viz. the six elder children.

Another clause in the will provides that if Nehemiah, having survived his father and mother, should be desirous of disposing of his interest in the premises, he should first offer

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it to his brothers, and if they should refuse to purchase it, then he should be at liberty to sell his interest to whomsoever he might see fit.

The wife survived the testator, and is now dead; the son is still living, and is the defendant. Could he convey an estate in fee?

Under the first clause of this will, it seems to us clear, that the wife and son would take the estate in moieties, as tenants in common. They would be tenants in common, and not joint tenants, because they would not take estates of equal duration, and because the Rev. Sts. *c.* 59, § 10, make grants and devises to two or more tenancies in common, unless the intent to create a joint tenancy manifestly appears. Here the contrary manifestly appears, because there are gifts over, which are inconsistent with a mutual right of survivorship. The effect of this first devise would be to give one moiety to the wife for life, remainder to the son in tail, and the other moiety directly to the son in tail. As to this moiety, Nehemiah took an immediate estate tail in possession, which he could forthwith bar, by his deed, whether he should ever have issue or not. Had he died in the life time of his mother, without barring the entail, and without issue, then, by the devise over, the mother would have taken an estate for life, with remainder in fee to the elder children. But he did survive his mother, and remained tenant in tail of this moiety, until he executed the deed to the plaintiff.

As to the other moiety, by the first proviso, it was a devise of the same to the mother for life, remainder to Nehemiah in tail, remainder to the elder children in fee. After the death of his mother, therefore, Nehemiah was tenant in tail in possession, and by force of *St.* 1791, *c.* 60, § 1, had power to bar the entail by his deed in fee.

The second proviso looked to a contingency which did not happen, viz. the death of the wife in the life time of the testator. If it had happened, then the whole was given to the son, and the heirs of his body, and he still would have had an estate tail.

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The third proviso also looked to a contingency which did not happen, viz. that of the son's dying without issue, in the life time of his mother. Then the whole estate was given to the wife for life, remainder to the elder children in fee.

The fourth proviso looked to the contingency of the son's dying in the life time of the testator, having issue. In that event, the testator gives to them, that is, to the son's heirs in tail, to be held "in the same manner and on the like terms and conditions," as he had given to him, to hold "either jointly with his mother," that is, in common during both their lives, "or to his own use, as events may prove;" meaning, as we understand it, as the mother may outlive the testator or otherwise, and so long as she may live. The effect of this would be, had the contingency happened, and had the son died in the life time of the testator, leaving issue, that the heirs of his body would take as purchasers, to hold, as tenants in tail, one moiety during the life of their grandmother, and the whole after her decease; or, in case she had also died in the life time of the testator, then to take the whole as purchasers, under that deliquation.

Perhaps this last proviso did no more than declare, by the express terms of the will, what the statute would have effected without it. By the Rev. Sts. c. 62, § 24, following substantially St. 1783, c. 24, § 8, it is provided, that when a devise of real or personal estate is made to any child or other relative, and the devisee shall die before the testator, leaving issue who survive the testator, such issue shall take the estate, so devised, in the same manner as the devisee would have done, if he had survived the testator.

Thus far the will seems to be clear; giving the son Nehemiah an estate tail in possession in one moiety, and an estate tail in remainder in the other moiety, which became an estate tail in possession at the decease of his mother. And so it must stand, unless these provisions are modified, varied or controlled by the subsequent clause in the will, beginning at the words, "my meaning and intention being," &c.

That clause, not beginning a new sentence, but in form

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following as a part of the next preceding, is as follows: "My meaning and intention being, to give said described lands and tenements to my said wife and my said son Nehemiah, for their lives, and to the survivor of them; then to the children of said Nehemiah, lawfully begotten; and in default of issue, then to my children aforesaid, to wit, Susan," and the other children of his former marriage, before named.

The first remark on this clause is, that it might be construed as qualifying the last proviso, and not the whole will. But it would not be safe to adopt this construction, unless it is quite clear that it is the true one; because, in general, every clause and article in a will may be resorted to, to ascertain the true intent and meaning of the testator in every other provision or clause.

Supposing that this clause is intended to extend back and qualify the whole will, how is it to be construed? Does it reduce Nehemiah's interest to an estate for life? When a devise is made in words clear and distinct, having a settled and definite, as well as a technical meaning, and afterwards words like those in the present clause are inserted, "meaning," &c., if they are directly repugnant and irreconcilable, it would be a question of great difficulty to decide which shall prevail and which shall yield. It would require a careful examination and study of every part of the will, to ascertain, if possible, the leading object and purpose of the testator, and with the aid of established rules of exposition, and as nearly as the rules of law will admit, give such a construction as will best carry into effect such leading object and purpose of the will, and such as will do the least violence to any part of it. But the first object, in expounding such a will, is to consider whether there be such an irreconcilable repugnancy in its different provisions; and, in taking them together, to adopt such construction as will give effect to both. We think the clause in this will, so apparently repugnant, may be reconciled.

The leading rule in the exposition of wills is, that the intent of the testator, when discovered, shall govern. But

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this is to be taken with one well known exception, as well established as the rule itself; which is, that such intention can be carried into effect without violation of any of the rules of law. If repugnant to such rules, the intent must yield.

No rule of law is better established than this; that an estate tail may be barred by the tenant in tail. Indeed, without this essential incident, entails would be made perpetual, and thereby become intolerable. No rule of the common law has been more steadily adhered to and enforced, in England, than this. It is an essential and inseparable quality of an estate tail, that it may be barred by a common recovery. Our own law has fully adopted this policy, in its whole extent, and carried it further, by providing, (Rev. Sts. *c.* 59, § 3, following *St.* 1791, *c.* 60, § 1,) that entails may be barred by a deed of conveyance in fee, by the tenant in tail, and (by Rev. Sts. *c.* 60, § 29) that estates in tail may be taken to satisfy the debts of tenants in tail, during their lives, and after their decease. This is as firmly established as the rule that no intention of the testator, however strongly expressed, can render an estate, devised in fee, inalienable, or in any way restrain its alienation by the devisee.

Such being the obvious and settled rule of law, it follows clearly that although a testator may create and devise an estate tail, he cannot, by any intention, however clearly expressed, deprive such estate of its essential incident of being liable to be barred by the simple conveyance in fee of the tenant in tail, and of being liable for the payment of his debts.

With these views, we are to construe the clause in question, and learn what the meaning of the testator was. The first meaning expressed is, that the land is given to his wife and son, for their lives, and to the survivor. If this clause stood alone, it might be an appropriate one to create a joint tenancy; but we have before seen that the original devise, for reasons already stated, was of an estate to them as tenants in common, and not in joint tenancy. The effect of this clause therefore is, that in certain contingencies the survivor might have

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the whole; the one as tenant for life, strictly, the other as tenant in tail, being an estate for life, and something more. This may be carried into effect by construing it a life estate to the wife, and an estate tail to the son, of one moiety during the life of the mother. The mother had her estate only for life; one moiety during the life of the son, and the other if she survived him. Now, although the son had a moiety, during the life of the mother, as tenant in tail, yet he might not bar it in his life time, and might die without issue, and then, by the gift over, the mother would have the other moiety, as survivor.

It may perhaps be urged, in answer to this, that the testator intended that the wife should actually have the whole, if she survived the son, which intent might be defeated, if it were construed an estate tail; because, in that event, he might bar it, or it might be taken for his debts, in his life time, and still he might die before his mother, and so the intent of the testator would be defeated. But we think the answer is, that this would be an intent contrary to the rules of law; to wit, to create an estate tail not liable to be barred or taken for debts; and is an intent which cannot be carried into effect. In this clause, the testator does not manifest any purpose to give his wife and son an estate in joint tenancy during their lives, with absolute right of survivorship; nor does he manifest any purpose not to give his son an estate tail, as he had previously done in the former part of his will; though he may have mistaken the legal effect and operation of a gift in tail, by supposing it inalienable by the first taker, and which must necessarily go to the children. Still there is no change of the purpose to give his son an estate tail.

The next meaning disclosed in this clause is, that after the lives of the wife and son have terminated, the estate shall go to the children of his son. This is not defeated by construing the estate to the son an estate tail. Should the son die in the life time of the mother, not having barred the entail in his moiety, it would vest in the mother, by the devise over, for her life, remainder to the children of Nehemiah, to take as

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purchasers. But should the son survive the mother, then the son would take an estate tail in the whole; and should he die without barring the entail, the children would take *per formam doni*. And the same remark may be made as before, that if it was the intention of the testator that the children should certainly take, it was in effect an intention that the father should not bar the entail; an intention which could not be carried into effect, because it would be contrary to the rules of law. It was clearly his intention that they should take as special heirs of their father, that is, as heirs in tail; and then any intention to prevent the father, as devisee in tail, from barring the entail, so that the estate should not come to the issue in tail, would be void. It would be still true that the father would be tenant in tail, and then, by the statute, his deed barred the entail.

The third purpose manifested in this clause is, that after the decease of the wife and son, the latter without issue, the estate should go to Susan and others, the elder children. This, too, would be carried into effect consistently with construing the will so as to give an estate tail to Nehemiah. If the wife had died, and then the son had died without issue, not having barred the entail, or suffered the estate to be taken for his debts, then it would have passed to Susan and the other elder children, as tenants in fee, in remainder, by force of the will.

If this clause stood alone, it would be more difficult to put a satisfactory construction upon it. But it does not stand alone. It purports to explain and illustrate what was before done, and make it more plain. It cannot control and counteract what had been previously done, unless it is directly and plainly repugnant and contradictory to the former part of the will. The former part of the will gave to Nehemiah an estate tail, in plain and express terms. If the clause in question stood alone, it might seem to give Nehemiah an estate for life, with remainder to his issue, by force of the statute, (Rev. Sts. c. 59, § 9, following *St.* 1791, c. 60, § 3,) controlling the rule in *Shelley's case*. But the clause coming, as it does, after

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provisions which clearly give an estate tail to Nehemiah, it cannot control them, because it does not manifest an intent not to give him an estate tail. It may, by implication, indicate an intent, that through the operation of an entailment the grandchildren of the testator shall certainly take, and, for that purpose, that the first taker shall not alienate, and thus bar the entail; yet this is an intention which the law cannot carry into effect, because it is contrary to its own well established rules.

On the whole, the court are of opinion that the defendant was tenant in tail of the granted and warranted premises; that they were well and legally conveyed to the plaintiff in fee, by the defendant's deed; that the defendant's covenants for good title and right to convey have not been broken; and that judgment must be rendered, on the agreed statement of facts, for the defendant.

Luther P. Sargent *vs.* Jesse K. Webster.

The directors of an insolvent manufacturing corporation have authority to convey all the property of the corporation to one of its creditors, upon condition that he shall apply the property to the payment of his claim, and pay over the surplus, if any, to the treasurer of the corporation: And such conveyance is not fraudulent, as against other creditors, by reason of its tendency to give a preference.

Unless the by-laws of a manufacturing corporation, or a statute, expressly provide otherwise, the same person may be treasurer and director, and a majority of the directors constitute a quorum, and a majority of the quorum have authority to decide any question upon which they can act.

It is not necessary that the president of a manufacturing corporation should be present at a meeting of the directors, in order to authorize them to transact business.

When a part only of the directors of a manufacturing corporation attend a directors' meeting, and transact business, it is not necessary to the validity of their transactions that it should appear that the absent directors had notice of the meeting: If the contrary do not appear, the legal presumption is that they had notice.

The directors of a manufacturing corporation voted that an assignment of all the property of the corporation should be made to S., one of the stockholders, (who was liable, for a large amount, as indorser for the corporation,) for the payment of his indorsements, and authorized the treasurer to make such an assignment, and sign it as treasurer: The directors, at the same time, voted that a bond should be taken of S., conditioned that the proceeds of the assignment should be applied to the payment of his indorsements, and that the surplus, if any, should be paid

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over to the treasurer, for the benefit of other creditors: The treasurer made a deed of release and quitclaim to S. of all the property, real and personal, of the corporation, and constituted S. the attorney of the corporation, to sue for and recover all money due, and all property belonging, to the corporation: To this deed the treasurer signed his own name, and affixed his own seal, declaring that he acted as treasurer and agent of the corporation, and was duly authorized: S. gave a bond to the corporation, with a condition conformed to the aforesaid vote of the directors, and also gave to the treasurer a power of attorney, authorizing him, in the name of S., to settle all accounts and demands of the corporation against all persons, and to sell and dispose of all the property of the corporation, and receive payment therefor, as S. might himself do: Afterwards, another creditor of the corporation attached part of the personal property assigned to S., as the property of the corporation, and S. brought an action of replevin against the attaching officer. *Held*, that the personal property of the Silk Company passed to S., by the assignment; that he was entitled to the property attached; and that the question, whether that property, though belonging to S., might lawfully be attached, under the Rev. Sts. *c.* 38, § 30, for the debt of the corporation, was not open to the officer.

THIS was an action of replevin, brought to try the title to two hundred and fifteen pounds of raw silk, three pounds of manufactured silk, and a lot of paper boxes. The case was submitted to the court upon the following agreed statement of facts:

On the 7th of May 1845, a writ in favor of Oliver Capen against the New England Silk Company, incorporated on the 16th of March 1836, was put into the hands of the defendant, a deputy sheriff, for service, and he attached the articles replevied in this suit, as the property of said company. The plaintiff, at the time of the said attachment, and at the time when the debt was contracted, on which said Capen's writ was sued out, was a stockholder in said company, the capital stock of which had been fixed, and certified as paid in, and the certificate recorded in the registry of deeds. A notice of the amount of the assessments voted by said company, and actually paid in, and of the existing debts of the company, was published in a part of the edition of the weekly newspaper called the Norfolk County American, issued and bearing date on Friday the 26th day of July 1844, a copy of which notice is in the margin.* About two thirds of the whole

* The New England Silk Company, conformably to the 22d section of the 38th chapter of the Revised Statutes of this Commonwealth, hereby give

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edition of the paper of the above date had been worked off, before said notice was put into the hands of the printer. The notice was then brought to the printing office, by C. Colt, jr. with a request by him that it might be inserted in that paper. Some objections were made, by the printers, to their inserting it, for the reason that, as so large a portion of the paper was already printed, it would be of no use; but, at the urgent request of said Colt, and with a full knowledge, on his part, of this fact, the press was stopped; other matter was removed; and the notice was inserted and published in the remaining papers of that edition, and was not published in any paper of a subsequent date.

The said Silk Company, about the 11th of March 1845, became insolvent, and the plaintiff was liable for its debts, as indorser or guarantor, to the amount of $10,000 or more, but was not so liable for the debt on which said Capen's writ aforesaid was issued.

The directors of said Silk Company were five in number, C. Colt, sen. being president. On the 17th of March 1845, at a meeting of the directors, at which three only were present, viz. J. H. Cobb, G. Alden and C. Colt, jr. the following votes were passed: "*Voted*, the president being absent, J. H. Cobb be elected president *pro tem*. *Voted*, that in consequence of the heavy loss the New England Silk Company has recently met with by fire, and the heavy amount Luther P. Sargent of New York is on their paper, (which amount being over twelve thousand dollars,) an assignment be made, of all the property whatsoever, belonging to said New England Silk Company, to Luther P. Sargent of New York, for

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notice that the amount of all assessments voted by said company, and actually paid in, is thirty thousand dollars; and the amount of all existing debts is sixteen thousand, seven hundred $\frac{35}{100}$ dollars.

Published by order of the Company.

C. Colt,
J. H. Cobb,
Geo. Alden,
C. Colt, jr.
} President and a majority of the Directors

Dedham, July 24th 1844.

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the payment of his indorsements; and we authorize the treasurer of said company, C. Colt, jr. to have an assignment made out, covering all the property of the company, and sign the same, as treasurer, which shall be binding on said New England Silk Company. *Voted*, that a bond be taken of L. P. Sargent, assignee, to the effect that the proceeds of the assignment be appropriated to pay off his indorsements, and should a surplus remain, the same be paid over to the treasurer, for the benefit of other creditors."

It does not appear by the records of said company, that the two directors, who were not present at the meeting, at which the above votes were passed, had notice that the meeting was to be held; and the clerk of the company, by whom, if by any body, said notice was given, cannot now state whether or not they had notice. C. Colt, jr. was the clerk, treasurer and one of the directors of the company.

On the 18th of March 1845, said C. Colt, jr. treasurer of said company, by a deed of that date, in which he styled himself "treasurer and agent of the New England Silk Company, and in their behalf, being thereto duly authorized," released and quitclaimed to said Luther P. Sargent, his heirs and assigns forever, "all the right, title and interest which said company now have in and to a tract of land in Dedham, containing one acre and five square rods, with the ruins and remains of their silk factory, recently destroyed by fire, thereon," and did "further remise, sell, assign and set over to the said L. P. Sargent all the goods, chattels and personal estate of the said company, of what name or nature soever, and all debts and sums of money due and owing to said company, and all securities for the same, and all their interest therein; the same to be liquidated and applied according to the condition of a bond of even date herewith, given by the said L. P. Sargent to the said company." Said deed also constituted said Sargent the attorney of the company, to demand, recover and receive all moneys or other property of the company. The concluding words of this deed of assignment were these: "In witness whereof, I the said Christopher Colt, jr. treasurer

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and agent for the New England Silk Company, and on their behalf, being duly authorized, have hereunto set my hand and seal, this eighteenth day of March one thousand eight hundred and forty five. Christopher Colt, jr. Seal." A magistrate certified that said Colt "acknowledged the above instrument, by him subscribed, to be *his* free act and deed."

On the same 18th of March 1845, said L. P. Sargent gave to the said Silk Company a bond, with a condition conformed to the vote of the directors, as above set forth.

On the 22d of March 1845, said Sargent gave to said C. Colt, jr. a letter of attorney, authorizing him, in said Sargent's name, to settle and close up all accounts and demands of said company against any and all persons, and to demand, recover and receive any money therefor, and to give acquittances, and to sell and dispose of all the property of said company in Massachusetts, and receive payment therefor, in the same manner that the said Sargent might himself do.

Within a week after the delivery of said deed to Sargent, the plaintiff, K. S. Pearson, as the plaintiff's agent, took possession of the property thereby assigned, including the two hundred and fifteen pounds of raw silk, but not including the other property, replevied in this suit; and C. Colt, jr. subsequently, and before the attachment aforesaid on Capen's writ, took possession, under the power of attorney hereinafter mentioned, of the aforesaid assigned property remaining in Dedham. The three pounds of manufactured silk were in the possession of a person in Canton, at the time of the attachment, and neither that nor the lot of paper boxes was taken possession of by the plaintiff, any further than the general possession taken, as above, by the plaintiff's attorneys, of the articles above named, constituted, in law, a possession of the same.

The writ, on which said property was attached, was duly returned into court, and judgment was rendered thereon against said Silk Company, upon which an execution issued, and was put into the defendant's hands, within thirty days after the rendition of judgment, and by him levied on said

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property, which was taken from him, on the plaintiff's replevin writ, before sale.

D. A. Simmons, for the plaintiff.

J. J. Clarke & M. S. Clarke, for the defendant.

SHAW, C. J. The plaintiff claims property in the goods replevied, consisting of wrought and raw silk, and paper boxes, under a conveyance from a manufacturing corporation, styled the New England Silk Company. The defendant justifies under an execution against the said company in favor of creditors of the company.

It appears that the plaintiff was a creditor of the company, for advances, and was surety and indorser, to a large amount on their outstanding securities; that after their principal building was burnt, they were insolvent and unable to pay their debts; and that at a meeting of the directors, March 17th 1845, they passed a vote, reciting these facts, and that the plaintiff, as their indorser, was on their paper to an amount over $12,000, and declaring that an assignment be made to him of all the property whatsoever, belonging to the company, for the payment of his indorsements, and authorizing the treasurer of the company, C. Colt, jr. to make and execute such assignment, which should be binding on the company; and that a counter bond be taken of the plaintiff, binding him to apply the proceeds of the property to the payment of such indorsed notes, and to account for such application, and pay over the balance, if any. The treasurer made and executed such assignment, in his own name, and under his own seal; and the plaintiff executed the counter bond, as required. Subsequently, and before the attachment and seizure made by the defendant, the plaintiff executed and delivered to the said C. Colt, jr. a letter of attorney, with full power to take, hold and dispose of all the assigned property, for his use and in his name.

Several objections were taken by the defendant to the plaintiff's title.

1. The first is, that the deed of the treasurer, in his own name, though he had a sufficient power, was inoperative to

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pass the title of the corporation; that it should have been executed in the name of the corporation, and under their seal.

If a deed were necessary, in this case, to pass the property, there would be great weight in this objection; but the vote of the directors was, in effect, an agreement of transfer, when accepted by the plaintiff, and the effect of the assignment of the treasurer, who had the care and control of all the property, was little more than to hand the property over, pursuant to the vote. The power of attorney, given by the plaintiff to Colt, jr. was an acceptance of the assignment, and vested the personal property in him, without the deed. A different rule may apply to the real estate, as to which we give no opinion. When the objection is to the legal sufficiency of the execution of an instrument, although in form entire, it may be good in part and void in part, as the conveyance is sufficient in regard to one species of property, and not to another. Such was the effect of a will, executed without three witnesses, before the statute; and by statute it was altered upon obvious considerations of policy.

2. It was objected, that the directors had no authority, by their vote, to make such conveyance, or authorize the treasurer to make it; but that it must be done by the stockholders. We think this objection is not well taken. The directors, we think, had an authority to make a conveyance of all their property provisionally, and upon condition to pay, or provide for the payment of the just debts of the corporation, with proper security that no more should be applied by the assignee, than enough to pay those debts.

3. Another objection is, that such a conveyance could not be made by the stockholders; because it would tend to give a preference, and thus be fraudulent against other creditors.

Such a conveyance would now be fraudulent, if made by an individual, because it would be repugnant to the letter and spirit of the insolvent laws. But as corporations are not subject to the insolvent laws, and the law stands, in regard to them, as it did before, these provisions do not apply. Nor does it appear that the proceeding was not in furtherance of

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the purposes of the incorporation. It was a trading corporation; and one of these purposes was to pay their debts, to enable them either to go on successfully again by the aid of new assessments, or to wind up and settle, upon terms most advantageous to the stockholders.

4. It is objected, that there was not a majority of the directors present, when the vote was passed; because, though three were present, out of five, yet C. Colt, jr. was not eligible as a director, because he was treasurer. We see no ground for this objection. A cashier of a bank is not competent to be a director; but it is because it is so expressly provided by statute. In ordinary cases, when there is no other express provision, a majority of the whole number of an aggregate body, who may act together, constitute a quorum, and a majority of those present decide any question upon which they can act.

5. Another objection of the same kind is, that it does not appear that notice of the meeting was given to all the directors. But the contrary does not appear; and it would be hazardous to decide that every vote, passed by an aggregate body, is void, if it do not appear by the record that all were notified. We believe it is not usual, in corporate records, to state how the members were notified. The presumption, "*omnia rite acta*," covers multitudes of defects in such cases, and throws the burden upon those, who would deny the regularity of a meeting, for want of due notice, to establish it by proof.

6. It is objected, that the president was not present at the meeting at which the vote authorizing the assignment was passed. We cannot perceive the force of this objection. "The president and directors" is a convenient and very common mode of designating the board of directors, in their aggregate capacity; but it does not render the presence of the president essential, unless otherwise required by the charter or by-laws.

7. But another ground, now taken by the defendant, assumes that whether the assignment were valid or not is

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immaterial, because even if the property was the plaintiff's, he was a member of the corporation, whose individual property was liable to be taken to satisfy an execution against the corporation, and so the defendant was justified in taking it as his property, by force of the Rev. Sts. *c.* 38, § 30.

In the first place, it is very clear that the plaintiff, Sargent, though a member of the corporation, had a right to deal with them as with a person and body politic. He could take security or attach property, or take any other measure that another creditor could; and though he might be liable, in a qualified way, for the debts of the corporation, it was a special liability created by statute, and one which can be enforced only in the mode provided by statute. *Peirce* v. *Partridge*, 3 Met. 44. But we think the question, whether this property could have been seized as the property of Sargent, on an execution against the corporation, on the ground that he was a member, is not open in the present case, because it was seized as the property of the corporation, liable for its own debts, and as their property, of which no conveyance had been made, valid as against creditors. The two claims are not only different from each other, but they are repugnant. Taking it as the property of the corporation disaffirmed the validity of the conveyance to Sargent, and held it to be void as to them. Claiming it as Sargent's property would have affirmed that conveyance, and precluded the attaching creditors, for whom the defendant acted, from questioning that conveyance. Yet in this suit, most of the grounds have been taken, which could be taken, to show that the plaintiff took no property, as against creditors, by that conveyance.

Besides; the rights and remedies of the plaintiff would be entirely different. If taken as the property of the plaintiff upon his liability as stockholder, he would have a right of action, for reimbursement, against the corporation, and a remedy in equity for a contribution against all the other members. But if taken as the property of the corporation, the debt of the corporation would be satisfied out of their own property, and the plaintiff would be without remedy

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although his title was good, and the property conceded to be his by the conveyance.

We have therefore not thought it necessary to consider and decide whether the plaintiff was liable as a member of the corporation. He was so liable, unless the corporation had complied with the provisions of the statute, (Rev. Sts. c. 38, §§ 17, 18, 22,) in recording and publishing a certificate, so as to take away this individual liability. Speaking for myself only, it may be proper to say, that so far as this depends on the sufficiency of the publication, as set out in the statement of facts, I should think it must fail. A publication in a small portion of the whole circulation of a newspaper, does not accomplish the purpose of public notice intended by the statute to be given. But of this we have not found it necessary to give an opinion. *Judgment for the plaintiff.*

Freeman White & others *vs.* The South Parish in Braintree.

A parish, as well since as before the repeal of *St.* 1789, *c.* 19, by *St.* 1826, *c.* 143, is legally capable of taking and holding gifts, devises and bequests of real and personal property, for the purpose of maintaining and supporting schools.

In 1829, A., B. and C., and their associates, were "incorporated as a religious society and body politic and corporate, with all the powers, privileges and immunities, and subject to all the liabilities of parishes according to the constitution and laws of this Commonwealth;" and said society was authorized "to hold and possess, by grant, gift, devise or otherwise, real and personal estate, for the purpose of supporting public worship, and other parochial charges." *Held*, that the act of incorporation placed the society on the same footing with all other parishes and religious societies not territorial, and that the society had a legal capacity to take and hold real and personal property, given to it by a will, in which the testator directed that the property should "be applied for the benefit of schooling all the children belonging and residing in said parish."

Writ of entry, brought by the heirs at law of John R. Hollis, to recover lands situate in Braintree and Quincy, and which the tenants claim to hold under the last will of said

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Hollis. The parties submitted the case to the court upon the following statement of facts:

John R. Hollis died seized of the demanded premises, in May 1842, leaving a will, dated April 13th 1842, and a codicil thereto, April 25th 1842, which were duly proved and allowed by the judge of probate. The demandants are all the heirs of said Hollis, and have duly entered upon and demanded said premises, which are the same that are referred to by said Hollis, in his devise of "the improvement of the residue of" his "property, both real and personal, to the South Parish in Braintree."

By *St.* 1828, *c.* 84, the tenants were "incorporated as a religious society and body politic and corporate, by the name of the South Parish in Braintree, with all the powers, privileges and immunities, and subject to all the liabilities of parishes, according to the constitution and laws of this Commonwealth;" and with the right to "hold and possess by grant, gift, devise or otherwise, real and personal estate, for the purposes of supporting public worship and other parochial charges, not exceeding the net annual income of one thousand dollars," and with the power "to choose trustees to manage the same."

The said Hollis, in his will, after directing his just debts to be paid, and giving a specific legacy to his sister, Betsey Hunt, made the following devise: "I give to my said sister, Betsey Hunt, the improvement, during her natural life, of all my real estate lying and being on the north side of the road, called Plain Street; also the improvement, during her natural life, of the piece of land situated on the south side of the said Plain Street, bounded," &c. "And at the decease of my said sister, Betsey Hunt, I give the improvement of all the same property, above described, to her son, Nathaniel H. Hunt, during his natural life; and at his decease I give all the same property to his children and grandchildren. In case the said Nathaniel H. Hunt should not leave any child, or grandchild, or grandchildren, I give the improvement of all the said property to the South Parish in said Braintree, now under the pastoral care of the Rev. Lyman Matthews, to be applied for

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the benefit of schooling all the children belonging and residing in said parish."

Another clause in said will was as follows: "I give to John Ruggles Hollis Williams, son of Chauncey Williams of Weymouth, one hundred dollars, to be paid to him by my executor, when he, the said John R. H. Williams, shall become of age; and my executor is hereby directed to put the said sum of one hundred dollars at interest, with some responsible security, and the interest thus accruing is to be paid to the said John R. H. Williams, at the said time when he becomes of age; and in case the said John R. H. Williams should die before he comes of age, and leave no issue, then the said sum of one hundred dollars, and the interest on the same, I give to the aforesaid parish, the interest of which to be applied for schooling, as aforesaid."

The last clause in said will was thus: "I give the improvement of the residue of my property, both real and personal, to the said South Parish in Braintree, upon the following conditions and stipulations; viz. the whole of which property to be placed into the hands of three suitable trustees, (in trust for said parish,) chosen annually by said parish, by written ballots, expressly for this purpose; they to manage the same in the following manner; viz. the real estate to be leased out for any length of time not exceeding five years on any lease; the personal property to be put to interest, secured by mortgage on real estate to double the value, or on security of the town of Braintree, or the security of any incorporated city; the income of both real and personal estate together, with the income of what I have heretofore given, in this will, for schooling, is to be for the benefit of schooling in said parish, as aforesaid. And in regard to the wood standing on said real estate, the improvement of which is for schooling, as aforesaid, I hereby authorize the said parish (if they think proper) to cut and sell, as they may deem necessary, and the avails of the same to be put to interest, as aforesaid, which interest is to be applied for schooling, as aforesaid; and none of the interest or income, as aforesaid, is to be applied for

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building, or the repairs of any building whatever; but for the hire of a good teacher or teachers; and none of the principal of the real or personal estate is ever to be diminished, but always kept for the benefit of schooling, as aforesaid."

In the codicil, the testator gave legacies to one of his nephews and to four of his nieces, and added this direction: "The aforesaid bequests, in this my codicil to my last will, I direct to be taken from the property, the income of which I have given to the South Parish in Braintree for certain purposes, as before stated."

All the demandants are named in said will and codicil, as devisees or legatees, and have, more than two years ago, received said devises and legacies.

A school was established by said parish (the tenants) in October 1845, and has ever since been in operation; and the whole income of the property devised to the parish, as aforesaid, has, since that time, been applied to the hire of a teacher in said school. The said school is attended by children of parents who are members of said parish; and as the children of parents, members of said parish, do not fill up the school, the directors of the school have admitted to the school children of parents not members of said parish, and not inhabitants of Braintree, and children of parents residing out of the State, on payment of tuition fees, which are appropriated to paying such expenses of said school as the income of said Hollis's property, devised therefor, is insufficient to pay. In said school are taught the learned languages, the various branches of an English education, music, both sacred and secular, as in the public schools in Boston and elsewhere.

The whole income of said parish, besides that given by said will, is about $250, and not $300.

In addition to the real estate demanded in this action, the tenants have received, under said will, of the executor, $3500·75 in money, and the sum of ——— for wood, cut off from the demanded premises, and sold; but the whole annual income from the property of said Hollis, both real and personal,

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devised to the tenants for the purposes expressed in the will, is not so much as $450.

At a legally warned parish meeting, founded on an article in the warrant, sufficient for the purpose, the parish, on the 21st of August 1842, "voted to accept the legacy bequeathed to the parish, agreeably to the will of Mr. John R. Hollis." And after passing sundry resolutions, among which it was recited that "this parish are under obligations to take prompt and efficient measures to carry into execution the provisions of said will," it was "voted to choose three trustees to receive and manage the fund left by the late Mr. John R. Hollis, deceased, for the purpose of maintaining a school in said parish, agreeably to the directions in his will;" and "Isaac Dyer, Apollos Randal and Edward Porter were chosen." "Voted that the trustees give bonds to the parish." "Voted that the name of the Hollis Institute be given to the school."

A school house was built by proprietors, by voluntary subscription, for said school, and has been used accordingly.

Said trustees have been elected annually by the parish, since 1842, and they have kept a record of their doings, showing their management of the fund.

On the 2d of April 1844, a board of seven directors was chosen by the parish "to arrange the school and employ a teacher, and transact any other business legally connected with the formation of the school;" and said directors have kept a record of their doings.

G. T. Bigelow, for the demandants.

Choate, for the tenants.

Shaw, C. J. This is a real action, brought by the heirs of John R. Hollis, deceased, to recover the demanded premises, of which it is admitted that said Hollis died seized. The tenants defend on the ground, that said Hollis made a will, which, after his decease in 1842, was duly proved and allowed, and by which he devised the premises to the said parish, to be placed in the hands of three suitable trustees, in trust for said parish, to be chosen annually by them, to manage

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the property; the income to be applied for the benefit of schooling in said parish; the principal to be forever preserved and kept good.

The demandants, not denying such devise in form, in the will of their ancestor, insist that the tenants, as a parish, had no legal capacity to take and hold property for the purposes mentioned in said will; that therefore this devise was wholly void, and that the estate vested in them, by descent, in the same manner as if such devise had not been made.

The question is, therefore, upon the validity and legality of this devise; and this depends upon the capacity of a corporation, chartered for parochial purposes, to take and hold such a gift of real estate.

This parish was incorporated by a special act passed February 26th 1829. The third section provides that they may hold and possess, by grant, gift, devise or otherwise, real and personal estate, for the purpose of supporting public worship and other parochial charges, not exceeding, &c. The argument is, that this special enumeration of purposes, for which they may hold gifts by devise, by reasonable implication excludes all others. But the court are of opinion, that this argument does not apply; because, in § 1, they are incorporated with all the powers, privileges and immunities, and subject to all the liabilities of parishes, according to the constitution and laws of this Commonwealth. Both are affirmative, and no negative words are used. Such a particular enumeration is often inserted for greater caution, and to remove doubts, when the same authority is given by a more general grant of power, in the same instrument. We think, therefore, that the tenants stood on the same footing with all other parishes and religious societies, not territorial.

In the case of the *First Parish in Sutton* v. *Cole*, 3 Pick. 232, it was held to be within the corporate powers of a parish or religious society to take and hold gifts and grants of real and personal property, for the purpose of maintaining and supporting schools. It is true, that in rendering judgment in that case, the court placed much reliance on *St.* 1789, *c.* 19

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§ 8, which was then in force, giving authority to parishes to raise such sums of money, on the polls and ratable estate of their respective inhabitants, for the maintenance and support of a schoolmaster, as they might deem expedient. The argument was, that if parishes could lay and assess taxes for that purpose, *a fortiori* might they accept gifts and donations for the same purpose. In that view, the argument was very decisive; but the case did not decide, that if that power to lay and assess taxes had been wanting, the corporation would not have had a legal capacity to take donations. On the contrary, many of the considerations suggested by the court would lead to a contrary conclusion.

We think that the power of a parish to assess taxes for any particular purpose is not a decisive test of their power to accept and hold property for purposes not precisely within the main object of their creation, to wit, the support of public worship, but yet not foreign to it, and not inconsistent with it. Should a friend and benefactor offer to erect, and give to a religious society, a building, to be used as a vestry and for singing schools, Sunday schools, adult evening schools, adult day schools, or reading and writing schools, as the society, by its proper officers, might direct or permit; these purposes are so akin to all the religious and charitable objects for which a religious society is formed, that it seems hardly doubtful that they would have capacity and power to receive and hold it, though they might not have power to lay taxes on polls and estates to raise money for erecting such a building. It is worthy of consideration, that the power of a corporation to raise money by taxation is a very high power. It is exercised by a majority, by means of which a minority may be compelled to pay money for objects, against their own will and judgment, payment of which is enforced by the highest compulsory power of the law. It is therefore guarded with great jealousy, and will not be held to exist, where it is not clearly given. None of these considerations apply to a voluntary donation.

It is then contended, that as the *St.* of 1789, *c.* 19, was

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repealed by *St.* 1826, *c.* 143, the power given to parishes to lay and assess taxes for the support of schools was revoked, and the authority, implied from it, to take and hold property for that purpose, fell with it. If the latter power depended wholly upon *St.* 1789, and there were no saving clause, this would be a legitimate conclusion. But if, by ancient usage, which seems to be implied in *First Parish in Sutton* v. *Cole*, parishes had power to hold property for the support of schools, then the *St.* of 1789 was rather the confirmation than the original source of that power. But we think the *St.* of 1826, in § 18, itself affords an answer to this argument. The act in terms repeals the act of 1789. But § 18 declares, that "nothing in this act contained shall be so construed as to affect the right of any corporation, heretofore or which may be hereafter established in any city, town or district in this Commonwealth, to manage any estate or funds given or obtained for the purpose of supporting schools therein," &c., "but such corporate powers and such estate and funds shall be and remain as if this act had never passed." The terms "any corporation" and the whole description are broad enough to include religious societies. They extended to those corporations which might be thereafter established, as well as to those then existing, and of course to funds afterwards to be given, as well as to those then held. This was after the decision in *First Parish in Sutton* v. *Cole*, declaring that parishes had power to take and hold estate, for the support of schools; and the effect of this statute was, to declare that nothing contained in it should impair, that is, that the repeal of the *St.* of 1789 should not impair, that right. This power was confirmed by *St.* 1834, *c.* 183, § 1, and by Rev. Sts. *c.* 23, § 59, and *c.* 20, § 2. The words "rights, privileges and immunities," as applied to parishes and religious societies, are large enough, and fitly adapted, we think, to include a capacity to receive gifts and donations, not only for the direct purposes for which they were constituted, but for purposes which, by usage and custom, and the general consent of enlightened persons, are regarded as analogous thereto

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Schools appear to us to be of this description; and the court are of opinion, that the power heretofore existing in parishes, to take and hold property, in their corporate capacity, for the support of schools, has not been taken away or impaired by any of the recent statutes respecting schools or parishes.

The sole question in this case is, whether the parish have a capacity to take and hold the land demanded, for the purpose specified in the will. If they have, it cannot be claimed by the heirs. It is not a question, to be considered here, whether the parish have established the right kind of school, or otherwise rightly appropriated the fund. If they can take it, they take it as a charity; and whether they act correctly or not, in the administration of the funds, the heirs cannot reclaim the estate as if it were a void devise. *Going* v. *Emery*, 16 Pick. 107. *Sanderson* v. *White*, 18 Pick. 333. In case of any mismanagement, the conduct of the donees will be regulated by the visitatorial power, if any, subject ultimately to the authority of this court, as a court of equity.

Judgment for the tenants.

WILLIAM MURRAY *vs.* THE COMMONWEALTH.

When a defendant is convicted, at the same term of the court, upon two indictments on the Rev. Sts. *c.* 127, § 16, charging him with uttering and passing counterfeit coin as true, knowing it to be counterfeit, and also upon a third indictment on § 15 of the same chapter, charging him with having in his possession, at the same time, ten pieces of counterfeit coin, knowing them to be counterfeit, with intent to utter and pass them as true, the court is not authorized to adjudge him to be a common utterer of counterfeit coin, and pass a single sentence upon him as such, under § 17 of that chapter.

WRIT OF ERROR, to reverse a judgment of the court of common pleas, rendered in the county of Essex, at June term 1846. At that term of the court, three indictments were returned against the plaintiff in error. One of them charged him with having in his possession, at Beverly, on the 9th of May 1846, a counterfeit coin, in the similitude of an

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American half dollar, which he then and there uttered as true, with intent, &c. knowing the same to be false and counterfeit. Another indictment charged him with a like offence, at Salem, on the same day. The third indictment charged him with having in his possession, at the same time, ten pieces of counterfeit coins, called Mexican dollars and American half dollars, knowing them to be false and counterfeit, with intent to utter and pass the same as true.

To all these indictments the plaintiff in error pleaded guilty. The court thereupon adjudged him to be a common utterer of counterfeit coin, and sentenced him to solitary imprisonment one day, and confinement afterwards at hard labor seven years in the state prison.

The error assigned was thus: "Said judgment is erroneous, inasmuch as a consolidated sentence, as a common utterer of counterfeit coin, could not have been rendered against said Murray, either upon the last indictment on which he stood convict, or upon the same indictment conjointly with the two others in said record set forth."

G. Bemis, for the plaintiff in error.

Wilkinson, (District Attorney,) for the Commonwealth.

Dewey, J. The plaintiff in error was duly indicted in three several indictments, one of which was under the Rev. Sts. *c.* 127, § 15, and the others under § 16 of the same chapter, all relating to the subject of having in possession counterfeit coin, with intent to pass the same as true, or the passing of the same as true, knowing the same to be false. Having been convicted upon all these indictments, a joint sentence of imprisonment at hard labor for seven years, and one day solitary confinement, was awarded against him, upon all the indictments. This sentence he seeks to reverse, upon the ground that no proper case existed for a joint sentence upon three several indictments; that such judgment can only be authorized under the provisions of Rev Sts. *c.* 127, § 17, where it is provided, that "if any person, who has been convicted of either of the offences mentioned in the preceding section, shall be again convicted of either of the same offences,

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committed after the former convictions, or if any person shall, at the same term of the court, be convicted upon three distinct charges of the said offences, he shall be deemed a common utterer of counterfeit coin, and shall be punished by imprisonment not more than twenty years." The case specified is that of three distinct offences under the preceding section. The offences, for which that section (§ 16) prescribes the punishment, are, *first*, the having in possession any number of pieces, less than ten, of the counterfeit coin mentioned in § 15, knowing them to be counterfeit, with intent to utter or pass them as true; and *secondly*, the uttering, passing or tendering in payment, as true, any such counterfeit coin, knowing the same to be false and counterfeit. Now only two of the indictments against the plaintiff in error charged offences under that section. The other indictment charged him with the more aggravated offence described in § 15, namely, the having in his possession, at the same time, ten or more pieces of false money or coin counterfeited in the similitude, &c. knowing the same to be false and counterfeit, and with intent to utter or pass the same as true.

The sentence awarded in the case of the plaintiff in error is one that can be legally awarded only by virtue of some statute provision. But the statute contemplates three distinct offences under § 16. It was not competent to award the joint sentence, treating the conviction under § 15 as one of the three cases authorizing the sentence prescribed in § 17. The offence under § 15 is a more aggravated offence, and should be punished by a separate sentence.

It was suggested by the district attorney, that the punishment awarded was in fact less than might have been awarded upon the two indictments under § 16. But that view, we think, will not justify the sentence, inasmuch as it professes to be awarded upon the three indictments, including the offence under § 15.

Not finding any authority for the joint sentence awarded against the plaintiff in error, the court are of opinion that the same must be reversed.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF ESSEX, NOVEMBER TERM 1847,
AT SALEM.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. SAMUEL S. WILDE, } JUSTICES.
HON. CHARLES A. DEWEY, }

GEORGE A. PUTNAM *vs.* DANIEL TILLOTSON.

A bill of lading, signed "A. B., for the master," is admissible in evidence, if A. B. had authority so to sign, although his authority does not appear on the bill; and his testimony, if believed, is sufficient proof of such authority.

In an action for shoes sold and delivered, brought by a manufacturer in this State against a distant purchaser, evidence is admissible to show that when shoes are ordered, it is the usage and course of the shoe business, when no special mode of conveyance is mentioned by the purchaser, for the manufacturer to take the shoes to Boston, at his own risk and cost, and there deliver them to some regular line of packets running to the purchaser's place of business, and take duplicate bills of lading, and forward one of them to the purchaser, by mail, and that from that time the delivery is complete, and the purchaser takes the risk of loss.

ASSUMPSIT for shoes sold and delivered, by a shoe manufacturer in Danvers in this county, to a merchant in Mobile, in the State of Alabama. Trial in the court of common pleas, before *Ward*, J. whose report of the case was as follows:

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There was evidence tending to show that the defendant, in September 1840, ordered the shoes from the plaintiff, to be sent to him at Mobile; that the general course of the business, when no special mode of conveyance is mentioned in the order, is for the manufacturer here to take the goods to Boston, at his own cost and risk, and there deliver them to some regular line of packets running to the place of the purchaser, and take duplicate bills of lading, and forward one to the purchaser, by mail; and that, from that time, the delivery was complete, and the vendee took the risk of loss.

There was also evidence tending to show that the plaintiff did deliver the shoes in Boston, at the packet office of Lombard & Company, a regular line of packets to Mobile, and that he took the duplicate bills of lading, and sent one by mail to the defendant; that the shoes never arrived at Mobile, but were lost. It did not appear how they were lost, nor where, but simply that they did not arrive at Mobile.

O. H. Pierce, jr. was called as a witness, and testified that he was a clerk of Lombard & Company, and was called the shipping clerk; that his duty was to sign the bills of lading for the captains; that he was authorized by the captains and by Lombard & Company so to do, upon the receipt of the goods at the vessel, store or wharf; and that he never signed any bill of lading until the goods were delivered at one or the other of these places.

The plaintiff then offered a bill of lading, in the following form: "Shipped, in good order and well conditioned, by George A. Putnam, in and upon the good schooner called the Sudam, whereof Winsor is master, now lying in the port of Boston, and bound for Mobile, Ala. viz. four boxes shoes, being marked and numbered as per margin; and are to be delivered, in like good order and well conditioned, at the aforesaid port of Mobile, (the danger of the seas only excepted,) unto Daniel Tillotson or assigns, he or they paying freight for said goods, eight cents per foot, with primage and average accustomed. In witness whereof, the master of the said vessel hath affirmed three bills of lading, all of this tenor and date; one of which

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being accomplished, the rest to stand void. Dated in Boston the 25th day of November 1840. For the master, O. H. Pierce, jr." The defendant objected to this bill, on the ground that it did not appear, on the face of it, to be signed by the captain, or any person duly authorized. The objection was overruled, and the bill admitted, and the question of the authority of Pierce was left to the jury.

The defendant contended that, from the evidence in the case, it appeared that there was some difference or variance between the shoes ordered and those sent. On the same evidence, the plaintiff contended that there was no such variance, but that, if there was, the defendant had waived, by his letters to the plaintiff, all right to object on this account.

The court instructed the jury, among other things, that as to the variance between the goods ordered and those sent, unless the goods sent were those ordered, they must find for the defendant, unless the defendant, by his letters and acts, subsequent to the receipt of the bill of lading, waived all objection on this account; that if, by the regular and usual course of business, the plaintiff's only duty was to deliver to the packet office in Boston, and take the bills of lading, properly signed by the captain, or by his authority, and forward one to the defendant by mail, and if he did all this, then this was a delivery to the defendant, and the plaintiff was not bound to see the goods actually on board the vessel.

The jury found a verdict for the plaintiff, and the defendant alleged exceptions to the above rulings of the court

Roberts, for the defendant.

Perkins, for the plaintiff.

Shaw, C. J. The court are of opinion, that the directions given by the judge at the trial, on the point of delivery, were right. The goods were ordered by the plaintiff, to be sent to him at Mobile. The plaintiff, according to the course of trade, delivered them at the packet office in Boston, and obtained a bill of lading signed by Pierce, for the master. The questions as to the usual course of trade, and of the authority of Pierce to sign a bill of lading for the master, were left to

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the jury, who found for the plaintiff. The question of usage was properly left to the jury. *Clark* v. *Baker*, 11 Met. 186.

We take it to be well settled, as to goods ordered to be sent to a distant purchaser, that a delivery to a carrier appointed by the consignee, vests the property in the purchaser. *Stanton* v. *Eager*, 16 Pick. 467. So a delivery to a common carrier, in the usual course of business, when no carrier is named by the purchaser, is a good constructive delivery to vest the property in the vendee. *Dutton* v. *Solomonson*, 3 Bos. & Pul. 582. Also such carrier, who has executed a bill of lading, by himself or his authorized agent, becomes thereupon answerable to the consignee, and in case of non-delivery, the action may be brought by the consignee. *Dawes* v. *Peck*, 8 T. R. 330.

Such was the effect of the directions to the jury, by the judge of the court of common pleas who tried the case, and we think they were right. *Exceptions overruled.*

JEREMIAH RYAN *vs.* ELIPHALET HALL.

H. signed a memorandum, as follows: "I have sold to R. four building lots; first two lots ninety feet front, depth about one hundred and fourteen and ninety six and a half; next two lots one hundred feet front, depth about ninety two and seventy six feet; all the above lots the same as laid down on the plan: First two mentioned lots at five cents a foot; next two lots at four and a quarter cents a foot:" R. brought an action against H., alleging in his declaration that he had tendered to H. twenty five per cent. of the price of said lots, and demanded a deed thereof; that he was ready to execute mortgages to H., to secure the other seventy five per cent. of said price, and that H. had refused to execute a deed: At the trial, R. offered parol evidence to prove that when said memorandum was executed, it was agreed between him and H., that one quarter part of the purchase money should be paid in cash, on the delivery of the deed, and that the other three quarters should be secured by notes and mortgages, and that the notes should be payable in one, two and three years, with interest yearly. *Held*, that this evidence was inadmissible, both because it would vary the written agreement, the legal effect of which was to pay cash on demand, within a reasonable time, and because it was offered in proof of the terms of a contract for the sale of land, contrary to the statute of frauds.

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Assumpsit on the following memorandum: "Methuen December the 5th 1846. This is to certify that I have sold to Jeremiah Ryan of Amesbury four building lots, commencing on the main road, on the west corner of Durant's land; first two lots 90 feet front, depth about 114 and 96½; next two lots on the main road, 100 feet front, depth about 92 and 76 feet; all the above lots the same as laid down on the plan. First two mentioned lots at five cents a foot; next two lots at 4½ cents a foot. E. Hall."

The plaintiff's declaration alleged, that he had tendered to the defendant twenty five per cent. of the price of said lots, and had demanded a deed thereof; that he was ready to execute mortgages to secure the other seventy five per cent. of said price; and that the defendant had refused to execute a deed to him.

At the trial before *Shaw*, C. J. the plaintiff produced the foregoing instrument, and gave evidence of its execution by the defendant. It was objected to by the defendant, but was admitted.

The plaintiff then offered parol evidence, to prove that at the time when the contract was made, and the said written memorandum executed, it was agreed that the contents of the lots should be ascertained by a reference to the plan, mentioned in the memorandum, but kept in the exclusive custody of the defendant; also that one quarter part of the purchase money should be paid in cash, on the delivery of the deed; and that the other three quarters should be secured by notes and mortgages, on the same terms on which the Essex Company offered their lands for sale, and that those terms were, to pay in three yearly instalments, at one, two and three years, with interest yearly. This evidence was objected to, and ruled to be inadmissible, because it was not conformable to the statute of frauds, and would tend to alter and vary the terms of a written contract.

The plaintiff did not propose to offer any other evidence of a tender of the purchase money than that of twenty five per cent. of the price agreed, and of his readiness to execute mortgages conformably to such parol agreement.

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The judge was of opinion that there was no sufficient proof of a breach of contract, to maintain this action; and the plaintiff thereupon became nonsuit; the nonsuit to be taken off, and the cause to stand for trial, if, in the opinion of the whole court, the rulings and decisions, at the trial, were wrong.

N. J. Lord & C. S. Newell, for the plaintiff. The evidence, which was excluded, was not offered to contradict or vary a written contract, and therefore should have been admitted. The statute of frauds (Rev. Sts. *c.* 74, § 1) does not require any more to be written than was written; and the additional terms of the contract were admissible in evidence. 1 Greenl. on Ev. (2d ed.) § 284 *a*. *Jeffery* v. *Walton*, 1 Stark. R. 267. "Some memorandum or note" of the contract is required, by the statute, to be in writing; but "the consideration of such contract need not be set forth or expressed in the writing." The consideration of the contract in question is not set forth in the writing; at least, a part only of the consideration is there set forth. The price and the rate of payment are not the consideration; certainly not the whole consideration. The mode and terms of payment constitute a part of the consideration. These were agreed upon by parol, and the plaintiff should have been permitted to prove them. If A. agrees in writing to convey Blackacre to B., at five cents a foot, and B. likewise agrees in writing to convey Whiteacre to A., at five cents a foot, the promise of one is the consideration of the promise of the other, though it does not appear in the written agreements.

O. P. Lord, for the defendant. The statute of frauds does not enact that the consideration need not be in writing, but that it need not be expressed in *the* writing upon which the action is brought. This, however, is not material; for, in the case at bar, the consideration is expressed in the writing sued on. But the writing is not a sufficient memorandum, within the statute. It is not an entire contract. And parol evidence is not admissible to show what the entire contract was. By the legal construction of the writing, the full price was to be

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paid on the delivery of the deed of conveyance; and evidence of different terms, agreed on by parol, was rightly rejected. *Dow* v. *Tuttle*, 4 Mass. 414. *Allen* v. *Kimball*, 23 Pick. 473, and cases there cited. *Warren* v. *Wheeler*, 8 Met. 97. *Elder* v. *Elder*, 1 Fairf. 80.

Shaw, C. J. Supposing the memorandum, in the present case, would be sufficient to support an action, conformably to the statute of frauds, (Rev. Sts. *c.* 74, § 1,) on the principle of the maxim, *id certum est quod certum reddi potest*, upon the ground that the identity of the four lots can be ascertained by the references in the memorandum, the quantity of the land by the admeasurement, and hence the entire amount of the consideration, by the price per foot; still, there being no stipulation for credit, and no time limited, the contract, by its legal effect, was a contract to pay the whole amount in cash, and that on demand, within a reasonable time. A tender of a quarter of the amount only was not a compliance, on the part of the plaintiff, and of course the refusal to execute a deed, upon such tender and a demand, was no breach on the part of the defendant. *Warren* v. *Wheeler*, 8 Met. 97. *Thompson* v. *Ketcham*, 8 Johns. 189.

The parol evidence offered was inadmissible, both because it would vary and alter the written agreement, making the consideration payable by notes and mortgage, on time, instead of cash on demand, and because it was offered as proof of the terms of a contract for the sale of land, contrary to the statute of frauds. *Nonsuit confirmed.*

Betsey Bessom *vs.* Francis Freto.

R. conveyed to M. all the estates conveyed to R. by P., "excepting the chamber and bed room heretofore conveyed by said R. to A. L. B.; excepting and reserving also to B. B. that she may continue to live in the dwelling-house herein conveyed, during her life, without paying any rent therefor:" M. conveyed all the estates conveyed to M. by R., "excepting the chamber and bed room owned by A. L. B., and excepting also the reservation to B. B. that she may continue to live in the

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dwelling-house belonging to the premises hereby conveyed, during her life, without paying any rent therefor:" B. B. afterwards brought an action of trespass against F. for breaking and entering her dwelling-house and disturbing her possession thereof. *Held*, that though B. B. could not show title in the house by a reservation in a deed between other parties, yet that the reservation to her, in M.'s deed to F., prevented the reserved part of the estate from passing to F., and that if M did not interfere to prevent B. B.'s possession, but permitted her to occupy the house, her possession was lawful and valid against all other persons, and that she might maintain trespass, if her possession was violated. *Held also*, that though the description, in the deeds, of that part of the house which was reserved, was uncertain, yet if B. B., at the time when M. conveyed to F., was in possession of that part of the house, upon which the trespass was alleged to have been committed by F., M. was disseized *pro tanto*, and that part did not pass to F.; and that parol evidence was admissible to prove that B. B. had possession of that part, at that time.

TRESPASS for breaking and entering the plaintiff's dwelling-house in Marblehead. At the trial in the court of common pleas, before *Wells*, C. J. the plaintiff gave evidence tending to prove her possession of the house, claiming title, and that the defendant, against her will, introduced certain tenants into the house, and continued them there several months, against her will, and removed her furniture from certain parts of the house claimed by her.

The defendant justified under a deed from Hannah Martin to himself, and from George C. Roundy to said Hannah; and it was admitted that the original title to the house was in said Roundy. Said Roundy's deed to said Hannah was dated January 11th 1838, conveying to her all the estate conveyed to him by Philip Bessom and Betsey his wife, "excepting the chamber and bed room heretofore conveyed by me" (said Roundy) "to Abigail S. Bessom, by deed recorded with Essex deeds; excepting and reserving also to Betsey Bessom above named, widow of said Philip Bessom, deceased, that she may *continue* to live in the dwelling-house, during the term of her natural life, without paying any manner of rent therefor." The deed from said Hannah to the defendant, dated June 2d 1842, purported to convey to him the same estate which Roundy conveyed to her, by the deed above mentioned, and contained the same exceptions and reservations which were contained in that deed.

The plaintiff offered to prove that, at the time when said

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deeds were made, she was in possession of those parts of the house into which the tenants aforesaid were put by the defendant, and of all the house except what was excepted, in said deeds, as conveyed to Abigail S. Bessom. But the court ruled that such evidence was immaterial, and excluded it. The court also ruled, as matter of law, that the plaintiff was not entitled to maintain the present action, and a verdict was returned for the defendant. The plaintiff alleged exceptions to said rulings.

O. P. Lord, for the plaintiff.

N. J. Lord, for the defendant.

SHAW, C. J. Trespass *quare clausum*. The defendant justified under a claim of title, by a deed from Hannah Martin to himself, and from Roundy to said Martin. In the deed from Roundy to Martin, the grantor, after describing the estate as having been conveyed to him by Philip Bessom and Betsey his wife, makes the following exception and reservation: "Excepting and reserving also to Betsey Bessom above named, that she may continue to live in the dwelling-house herein conveyed, during the term of her natural life, without paying any manner of rent therefor." The defendant took his title subject to this exception and reservation. In his deed from Hannah Martin, the same reservation is made that is made in Roundy's deed to her.

Now, though a party cannot show title in himself by a reservation in a deed between others, to which he is not a party, yet such reservation will prevent the reserved part from passing to the grantee, and constitute a good reservation to himself. So here, though the plaintiff could not directly claim title to herself, yet it was a good reservation to the grantor, Hannah Martin, for the life of this plaintiff; and if said Hannah did not interfere to defeat the plaintiff's possession, but permitted her to occupy the house, she had a possession lawful and valid against all others, and might maintain trespass, if her right of possession was violated.

The principal difficulty lies in the uncertainty of the description of the part reserved. But the court are of opinion

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that if the plaintiff, when the deed was made by Hannah Martin to the defendant, was in possession of that part of the house upon which the trespass is alleged to have been committed, the said Hannah was disseized *pro tanto*, and that part did not pass. This was a question of fact, and parol evidence was competent to prove her possession at that time. The court having rejected the evidence offered for this purpose, the verdict must be set aside, and a

New trial ordered.

STEPHEN STANWOOD *vs.* CHARLES KIMBALL & others.

County commissioners laid an aqueduct from a spring, through the lands of several persons, to the county buildings, and thereby diverted the water which before flowed to the works of S.: At or about the time when the aqueduct was laid, a lateral pipe was inserted in it, and water thereby conveyed to said works; but it did not appear by whose order or at whose expense the pipe was thus inserted: The commissioners afterwards caused the pipe to be cut off, and S. was thereby deprived of the use of the water: S. brought an action against the commissioners, alleging, in one count, that they had diverted the water of the spring, and in another count, that they caused the pipe to be cut off: The commissioners, in their defence, gave in evidence a deed, executed after the aqueduct was laid, by S. and others, through whose land it was laid, in which deed they recited that it had been laid with their consent, and acknowledged that they had received full satisfaction for all damages occasioned to their several lands by laying it, and in which they also granted to the county the liberty of entering upon their several lands, for the purpose of repairing, or relaying, or taking up said aqueduct, whenever the county commissioners, or any authorized agents of the county, might deem it necessary; the county to pay to the owners of said lands such damages as should be thereafter occasioned by entering thereon for said purpose. *Held*, that this deed was a grant to the county of the entire use of the water of the spring; that the whole damages for such use had been received by S.; that if the pipe was inserted in the aqueduct before the deed was executed, the right to continue it was relinquished by the deed; that if the pipe was inserted after the deed was executed, it was either a trespass, or was done in pursuance of a parol license of the commissioners, which was revocable and had been revoked; and that, in either case the commissioners had a right to cut off the pipe.

TRESPASS UPON THE CASE against the county commissioners of this county. Trial before *Shaw*, C. J. whose report thereof was as follows:

The ground of the plaintiff's complaint was, that he was the owner of a small tract of land in Ipswich; that there was

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a brook, rill or watercourse, which ran down a channel or gutter in the road, between hills extending up some distance; that this brook, after passing by his land, passed through two or three other closes of other proprietors, and discharged itself into Ipswich River.

The plaintiff alleged that his business was that of a wool puller and dresser of skins; that he had sunk vats and pits on his premises, and erected buildings on them, and that the use of the water was essential to the useful and profitable prosecution of his said business.

The complaint in the plaintiff's first count was, that the defendants, without right, or justifiable cause, had diverted the water of a certain spring, called Grove's Spring, situated above the plaintiff's premises, (and which constituted an important and probably the most copious, source of the rivulet in question,) by sinking a longer, wider and deeper reservoir, at the site of said spring, and by conducting the water therefrom, by means of an aqueduct, to the jail, house of correction, and hospital for the insane, for the use of those county buildings in Ipswich.

The evidence offered by the plaintiff tended to show that the rivulet in question flowed down a gutter on one side of a way, called Hog Lane; that it was sometimes very small, but that there was seldom a time when there was not some water flowing in it; that Grove's Spring, one of the sources of this rivulet, was on the side of said way; that the surplus water of this spring ran across said way, into the gutter, and constituted a part of said rivulet.

The evidence left it a little doubtful whether the spring, which issued from an adjoining hill, was wholly within the close adjoining the way aforesaid, and now the property of the county, or was partly in that close and partly in said way. It appeared that there was a bend in the wall, (the whole of which was rather crooked,) at the place of the spring, and that a drinking place for cattle passing up and down said way was formed in the way. This place was at first formed of the section of a hollow log, bedded round and backed up with

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earth, and the log was afterwards removed and a square plank box substituted, which was bedded round and backed up as the log had been.

The defendants took various grounds of defence to the case made by the plaintiff, one of which was, that the proprietors of the lands, or some of them, through which the aqueduct passes, including the plaintiff, had by deed granted to the county a right to lay and maintain the aqueduct and divert the water, so far as it flowed from Grove's Spring, and had thereby released to the county all damages occasioned to him thereby. The deed was then offered in evidence, and its execution was admitted. It bore date June 19th 1844, and is copied in the margin.*

* We the subscribers, owners of land through which an aqueduct from Grove's Spring, so called, in Ipswich, to land of the county of Essex, whereon county buildings now stand, has been laid with our consent, have received in cash full satisfaction for all damages occasioned to our several lands by laying the same to this date, as may appear by our receipts bearing even date with these presents. And we do hereby grant to said county of Essex the liberty of entering upon our said several lands for the purpose of repairing, or relaying, or taking up said aqueduct, whensoever the county commissioners or any authorized agent of said county may deem it necessary; said county or its agent or agents causing all walls or fences, which may be removed by them, to be rebuilt or reset in as good a state as before their removal, and doing the least possible injury to said lands, and paying to the owners or occupants thereof such damage as may be actually occasioned from time to time hereafter by entering upon the lands aforesaid, for the purpose aforesaid. Aaron Cogswell, jr. and Hannah his wife, subscribers hereto, acting for and in behalf of their minor son Isaac E. Burnham, as well as for themselves.

Witness our hands and seals this nineteenth day of June, A. D. 1844.

Signed, sealed and delivered in presence of us.	Aaron Cogswell, jr.	[Seal.]
Jacob B. Tenney.	Hannah B. Cogswell.	[Seal.]
Abigail Staniford.	Thomas Dennis.	[Seal.]
Aaron Sweet.	Mary Dennis.	[Seal.]
Joseph N. Ames.	Isaac Stanwood.	[Seal.]
Mary J. Hodgkins.	Stephen Stanwood.	[Seal.]
Charles Smith.	George C. Dennis.	[Seal.]

This deed was duly acknowledged by the plaintiff, and on the back thereof was the following receipt: Ipswich, June 19th 1844. I, Stephen Stanwood, do hereby acknowledge to have received of the county of Essex the sum of twenty five dollars, for damage done to my land by entering upon the same and laying an aqueduct from Grove's Spring, so called, to the premises of said county, whereon county buildings now stand. Stephen Stanwood.

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The judge was of opinion that this deed was a conclusive and binding admission that the aqueduct had been laid by the consent of those who executed the deed, and that they had received full satisfaction for damages; or, looking at the provisions, in the deed, for the future repair of the aqueduct, upon the terms stated, and taking the whole instrument together, it was, in legal effect, a grant to the county of the right to lay and maintain an aqueduct through their lands, for the consideration therein stated; and that, in either case, it was a bar to this action. The judge was also of opinion that the right granted was not merely to enter upon their lands, from time to time, to lay, repair and replace aqueduct pipes, but to lay and maintain an aqueduct through which water should flow from Grove's Spring, and was an authority, so far as the plaintiff could give it, to take and divert the water of that spring, and was also a release of all damages occasioned by the diverting or diminishing of the stream or watercourse coming to the plaintiff's land, so far as the same would have flowed from that spring.

The plaintiff then proposed to put his case upon another ground, as stated in his second count, which alleged that, when the county aqueduct was laid down, a pipe was inserted therein, laterally, on the plaintiff's premises, by which water was conveyed to his vats and works; that it was of great use and benefit to him in his business; that he had a right to have it continued there; but that the defendants afterwards unlawfully, and without right, caused said pipe to be cut off, by means whereof he was deprived of the use of the water through said pipe.

It appeared that, when the county aqueduct was laid down, this lateral pipe was inserted, but by whose order, or at whose expense, did not distinctly appear; and that the water therefrom entered the plaintiff's works.

It was contended for the plaintiff, that from the fact that the lateral pipe was thus inserted for his use, a tacit or implied grant of the right so to enter it, and afterwards to continue it, was to be inferred. The defendants contended that such

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insertion of the pipe was permissive, experimental and provisional only; that they were willing the plaintiff should have such use of the water, if it could be had without diminishing the quantity required for the uses for which the aqueduct was laid; that no permanent right was thereby given to the plaintiff; that they retained their entire power and control over it; that, after some months, finding the water insufficient for the purposes of the aqueduct, they gave notice to the plaintiff of their intention to cut off the lateral pipe leading to his works, and, pursuant to such notice, caused it to be cut off — the plaintiff protesting against their right to do so, and forbidding the persons employed to do it.

The judge was of opinion that as the aqueduct was laid at the expense and for the benefit of the county, from the county land to the county buildings, the fee was in them; that as the plaintiff, in his deed to the county, had made no exception or reservation of the stream, or any part of it, the whole right to it, and to the use of the water, vested in the county; and that the fact that the side pipe was inserted, when the aqueduct was laid, was not one, independent of other facts, from which a right to continue it, and have the perpetual use of it, could be implied or inferred.

Supposing the whole right to the use of the water to be vested in the county, the judge was of opinion that it was incumbent on the plaintiff to establish his right to the use of part of it, by grant or prescription; that no grant was shown or could be presumed; that the use, whether adverse or permissive, having continued less than two years, furnished no proof of prescription; and that the action could not be maintained. Whereupon the plaintiff became nonsuit, subject to the opinion of the whole court.

Perkins & Haskell, for the plaintiff. The deed, executed by the plaintiff and others, did not release the damages which he now sues for. It does not appear from the deed that either party had suffered or released any damages caused by the diversion of the water. And the release is to be applied only to the damages which were common to all the releasors

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Rich v. *Lord*, 18 Pick. 322. It is now attempted to apply the release to one of the parties, as to a matter in which he alone has an interest, and a matter which is not mentioned in the recital prefixed to the release. Besides; only past damages are released by the deed, and not damages for the obstruction of the plaintiff's water rights, which the defendants have since caused.

As the specific matter referred to in the release is alone affected by it, the actual condition of things, at the time it was executed, should be taken into consideration, in construing its terms, and giving them their legal effect. *Dyer* v. *Sanford*, 9 Met. 395. See also *Choate* v. *Burnham*, 7 Pick. 278. *Waterman* v. *Johnson*, 13 Pick. 265. *Doe* v. *Burt*, 1 T. R. 701. *Williston* v. *Morse*, and *Goddard* v. *Dakin*, 10 Met. 27, 99.

The amount of the consideration, which the plaintiff received, is wholly inadequate to compensate him for the obstruction; and the terms of a deed will not, in such case, be extended by construction. *Hatch* v. *Dwight*, 17 Mass. 298.

But if the construction of the deed must be against the plaintiff, yet as the pipe, which the defendants have cut off, was in the aqueduct log, when the deed was given, and was afterwards continued there for the plaintiff's use, he must have understood that he was to have the use continued, and the defendants must have known that he so understood the matter. They are therefore estopped to deny his right to such continued use. 1 Story on Eq. § 384. *Pickard* v. *Sears*, 6 Adolph. & Ellis, 469. *Tufts* v. *Hayes*, 5 N. Hamp. 452. No writing was necessary, in order to give the plaintiff the use of the water. *Shattuck* v. *Gragg*, 23 Pick. 88. *Davenport* v. *Mason*, 15 Mass. 92. The defendants' permission may be regarded as an irrevocable license. *Ameriscoggin Bridge* v. *Bragg*, 11 N. Hamp. 102. *Clement* v. *Durgin*, 5 Greenl. 9. *Woodbury* v. *Parshley*, 7 N. Hamp. 237. *Ricker* v. *Kelly*, 1 Greenl. 117.

O. P. Lord, for the defendants. The subject matter of the deed throws light on its terms. That subject matter was the

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conveyance of water from Grove's Spring to the county buildings. The manner of conveying the water was a minor circumstance. The water was running in the aqueduct logs when the deed was executed, and therefore the damages for taking the water must have been included in the sum paid to the plaintiff. See *Hathorn* v. *Stinson*, 1 Fairf. 224, and cases there cited. *Wetmore* v. *White*, 2 Caines Cas. in Er. 87. *Jackson* v. *Vermilyea*, 6 Cow. 677. *Provost* v. *Calder*, 2 Wend. 517. *Pattison* v. *Hull*, 9 Cow. 747. *Ashley* v. *Pease*, and *Dryden* v. *Jepherson*, 18 Pick. 268, 385.

As to contemporaneous exposition of the deed, by the parties, the fact is, that the defendants used the water, from the beginning, as they now use it. That exposition is therefore in their favor, and against the plaintiff.

The defendants are not liable for cutting off the plaintiff's pipe. The plaintiff could not, by parol, reserve the right to continue to use it, and to take away the water from the county buildings. Such a reservation can be made only by deed. *Burr* v. *Mills*, 21 Wend. 290. If the pipe was used by license, that license was revocable; no consideration for it appearing.

Shaw, C. J. The gist of the plaintiff's complaint is, that he was the owner of a small parcel of land in Ipswich, along which, between his land and that of a conterminous proprietor, ran a small brook or stream of water; that the plaintiff had, on his own land, a shop or building, with vats and pits under it, used for washing wool and dressing skins; that he had formerly, and before the laying of the aqueduct hereafter mentioned, turned a part of said brook, as occasion required, so as to fill his vats and supply him with water, returning it again into the stream; that in or prior to the year 1844, the officers of the county laid an aqueduct, for the use of the county jail, house of correction, and hospital for the insane, with the consent of the plaintiff and other land owners, as expressed in their deed hereafter mentioned; that at or about the time said aqueduct was laid, a pipe, entering the same and conducting water to the plaintiff's works, was laid down, but by whose order, or under what authority, did not appear; that

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after a trial of one or two years, the county commissioners, finding that the supply of water for the county buildings was insufficient, after notice to the plaintiff, ordered the said pipe to be cut off, and it was cut off accordingly, to the great damage of the plaintiff.

The defendants relied upon a deed, executed by the plaintiff and others, on the 19th of June 1844, and which accompanies the report of the trial. The execution of this deed being admitted, the judge who tried the cause was of opinion, and proposed to instruct the jury, that this deed operated as a grant to the county of the entire use of the water; that the defendants, as county officers, had a right, if in their judgment the use of the county buildings required it, to cut off the plaintiff's pipe; and that the action could not be maintained. Whereupon the plaintiff became nonsuit, subject to the opinion of the whole court.

It has been contended for the plaintiff, that the construction put upon this deed, at the trial, is not the correct one; that the effect of the deed on the part of the plaintiff was to assent to the past acts of the county officers, in entering on his land and laying down the aqueduct, and an acknowledgment of the receipt of damages therefor, and the grant of a future right to enter his land, for the purpose of repairing and replacing the aqueduct pipes, doing as little damage as possible. But we cannot put this restricted construction upon this deed. The purpose is expressed by the term "aqueduct." An aqueduct, from a spring of water to certain buildings, can be applied to no other useful purpose, than that of conveying water to them. A right to the use of water is incident to the ownership of land, and a grant of a perpetual special use of land to convey water, carries with it a right to the use of the water to be conveyed. The grant of a right to lay and maintain aqueduct pipes would be useless and illusory without it. If the plaintiff might divert part of the water, why not the whole? He could not, as formerly, after using it, return it into the stream again. All that was withdrawn was diverted absolutely from the aqueduct. Every grant of a right or

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conveyance of water from Grove's Spring to the county buildings. The manner of conveying the water was a minor circumstance. The water was running in the aqueduct logs when the deed was executed, and therefore the damages for using the water must have been included in the sum paid to the plaintiff. See *Hathorn* v. *Stinson*, 1 Fairf. 224, and cases there cited. *Wetmore* v. *White*, 2 Caines Cas. in Er. 87. *Jackson* v. *Vermilyea*, 6 Cow. 677. *Provost* v. *Calder*, 2 Wend. 517. *Pattison* v. *Hull*, 9 Cow. 747. *Ashley* v. *Pease*, and *Dryden* v. *Jepherson*, 18 Pick. 268, 385.

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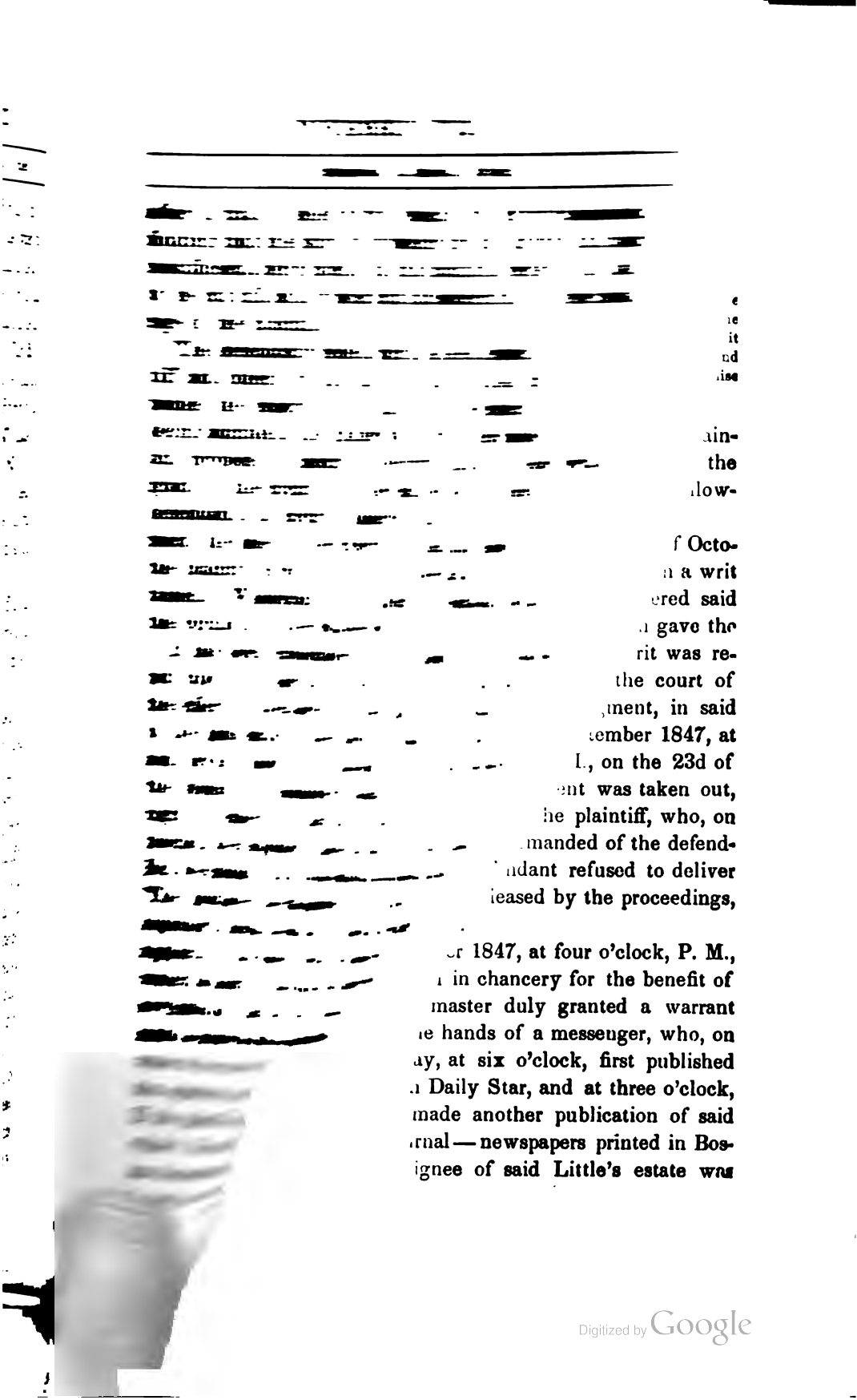

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privilege carries with it, by necessary implication, every thing necessary to its enjoyment, which the grantor has it in his power to grant. Looking at this deed, in reference to the subject matter, and the circumstances under which it was given, and with reference to its terms, it appears, either a perpetual grant of the use of the plaintiff's land, or rather it recites a previous parol grant, and by this deed ratifies and confirms it, for the purpose of conveying the water in question to the county buildings, and as incident thereto the use of the water; and he could not afterwards divert it.

But it has been further contended, that as the plaintiff's pipe was in fact inserted, at or about the time the aqueduct was laid and the deed given, it must be presumed that the plaintiff intended to reserve that right, and that the county officers acquiesced in it. But it is difficult to maintain this position. There can be no such right by *reservation*, whatever may have been the intent and expectation of the plaintiff, for there is none made in the deed, and it is not competent to prove it by parol evidence; nor by *grant*, for none is shown or pretended; nor by *prescription*, for it was used but a very short time. If this pipe was inserted before the deed, the right to retain it, there being no reservation in the deed, was relinquished by the deed, if we are right in construing it a grant of the use of the water. If it was inserted after the grant, it was either a trespass, or done in pursuance of a parol license, revocable, and afterwards revoked; and in either case the plaintiff can found no rightful claim on that ground. It would be difficult to find any authority, in county commissioners, to give any parol license or permission which would bind the county.

It is possible that the plaintiff embraced more in his deed than he intended to do; but we can infer his intention only from his deed, expounded according to the rules of law. It was wholly matter of contract, and it was competent to him to grant or reserve as much of his right to the land and water as he thought expedient; but, to the extent to which his deed goes, he has granted away his rights, and that must be deemed conclusive. *Nonsuit confirmed.*

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Theodore Andrews *vs.* Philip R. Southwick.

Though the first publication of notice, by a messenger, that a warrant under the insolvent law has issued against a debtor whose goods are attached on mesne process, be not made till after judgment is rendered against the debtor, yet if it be made before the goods are taken in execution, the attachment is dissolved, and the bailee, to whom the attaching officer had delivered the goods, upon a promise to return them to him, is discharged from the obligation of his promise.

Assumpsit on a receipt given by the defendant to the plaintiff, for certain goods, and a promise to return them to the plaintiff. The case was submitted to the court on the following agreed statement of facts:

"The plaintiff is a deputy sheriff, and on the 31st of October 1845, he attached the goods of Moses N. Little, on a writ sued out by Asa Lord against said Little, and delivered said goods, on the same day, to the defendant, who then gave the receipt on which this action is brought. Said writ was returnable, and was returned by the plaintiff, to the court of common pleas, and said Lord recovered judgment, in said court, against said Little, on the 22d of September 1847, at one o'clock, P. M. After one o'clock, P. M., on the 23d of said September, execution on said judgment was taken out, and immediately put into the hands of the plaintiff, who, on the same day, at four o'clock, P. M., demanded of the defendant the goods aforesaid, and the defendant refused to deliver them, on the ground that he was released by the proceedings, in insolvency, against said Little.

On the said 22d of September 1847, at four o'clock, P. M., said Little applied to a master in chancery for the benefit of the insolvent law, and the master duly granted a warrant forthwith, and put it into the hands of a messenger, who, on the morning of the next day, at six o'clock, first published notice thereof in the Boston Daily Star, and at three o'clock, P. M., on the same day, made another publication of said notice, in the Evening Journal — newspapers printed in Boston. Subsequently an assignee of said Little's estate was duly chosen."

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Haskell, for the plaintiff.

Northend, for the defendant.

Shaw, C. J. The plaintiff, a deputy sheriff, having attached the goods of Little on mesne process, delivered them to the defendant, and took his receipt for them. We have not seen a copy of the receipt, but presume that it was in common form, reciting the attachment and promising to restore the goods.

Judgment was rendered in the suit in which the goods were attached, but before the expiration of the twenty four hours, when an execution could be taken out on the judgment, the debtor, on his own petition, went into insolvency; a warrant was issued to a messenger, and he had published notice thereof in a newspaper. By these proceedings and the publication of notice, before the property could be *taken* in execution, being before it issued, the attachment on mesne process was dissolved. The general property being in the debtor, it vested in the assignee, and when the goods were demanded, by the plaintiff, of the defendant, it was a good answer and justification of this refusal to deliver them, that he had delivered, or was bound to deliver, them to the messenger or assignee. *Bigelow* v. *Pritchard*, 21 Pick. 169. *Sprague* v. *Wheatland*, 3 Met. 416. The first publication of notice fixes the time when the attachment is dissolved. *Briggs* v. *Parkman*, 2 Met. 258. *Ward* v. *Proctor*, 7 Met. 318. *Clarke* v. *Minot*, 4 Met. 346.

It was contended that in the present case, as the judgment was rendered before the commencement of the insolvent proceedings, a new lien was thereby created, which defeated the right of the assignee. But we think otherwise. In this Commonwealth no lien is created by the judgment itself. When goods are taken in execution, though the service is not completed, they cease to be holden by the attachment, and the right of the creditor can no longer be defeated by any proceedings in insolvency. *Cushing* v. *Arnold*, 9 Met. 26. It was supposed, however, by the plaintiff's counsel, that this effect was given to a judgment, by force of the Rev Sts c. 90

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§ 25, which declare that "if final judgment is rendered for the plaintiff, the goods and estate attached shall be held for thirty days after the judgment, in order to their being taken in execution." But this is not a just conclusion. The St. of 1838, c. 163, was passed after the revised statutes, and so far as it is repugnant to them, or so far as it controls or modifies them, it repeals them. The insolvent law declares, that, in the case stated, the attachment shall be dissolved; it therefore necessarily repeals all former laws, providing that in the same case the attachment shall be continued in force.

Judgment for the defendant.

GRIFFIN GIBSON *vs.* WYMAN BAILEY.

In an action to recover for labor, the plaintiff's memorandum book, containing his charges against the defendant, all entered on one leaf, with no intervening charges, and though written with a pencil, is admissible in evidence, on his suppletory oath.

ASSUMPSIT, on an account annexed to the writ, for labor done for the defendant. At the trial in the court of common pleas, before *Ward*, J. the plaintiff introduced a small memorandum book, containing the charges sued for, all which were upon one leaf of the book, with no intervening charges; and the whole were written with a pencil. The defendant objected to the admission of the book in evidence, but the judge overruled the objection, and permitted the book to go to the jury, with the suppletory oath of the plaintiff. A verdict was returned for the plaintiff, and the defendant alleged exceptions.

Caverly, for the defendant.

O. P. Lord, for the plaintiff.

BY THE COURT. In *Mathes* v. *Robinson*, 8 Met. 270, it was held that, "as the law has prescribed no mode in which a book shall be kept, to make t evidence, the question of

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competency must be determined by the appearance and character of the book, and all the circumstances of the case, indicating that it has been kept honestly, and with reasonable care and accuracy, or the reverse." The same, in substance, was said by the court, in *Cogswell* v. *Dolliver*, 2 Mass. 217, the first reported case on this subject. We must presume, in the present case, that the appearance and character of the plaintiff's book indicated, to the satisfaction of the judge at the trial, that it was kept honestly, carefully and accurately.

It was decided, in *Faxon* v. *Hollis*, 13 Mass. 427, that a book was admissible, though kept in a ledger form; that is, where all the charges against the defendant were entered on the same leaf of the plaintiff's book, with no intervening charges against others.

The objection, that the entries in the book were made in pencil, was not a cause for rejecting it. Under the statute of frauds, which requires certain agreements to be in writing, it is held that such agreements need not be written with ink, but that it is a sufficient compliance with the statute if they are written with a pencil. *Merritt* v. *Clason*, 12 Johns. 102. *Clason* v. *Bailey*, 14 Johns. 484. So an indorsement upon a promissory note, written with a pencil, is valid. *Geary* v. *Physic*, 5 Barn. & Cres. 234, and 7 Dowl. & Ryl. 653. So a will, written in pencil, is valid, if the court be satisfied that the testator intended that it should operate as his last will. *Rymes* v. *Clarkson*, 1 Phillim. 35. *Dickenson* v. *Dickenson*, 2 Phillim. 175. *In re Dyer*, 1 Hagg. Eccl. Rep. 219.

Exceptions overruled.

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Trustees of the Free Schools in the South Parish in Andover *vs.* John Flint.

When neither the charter of a corporation, nor any general statute, imposes on the individual members a liability to pay its debts, such liability cannot be imposed by a by-law of the corporation.

In an action of assumpsit against a member of a corporation, brought by one of its creditors to recover money lent to it, evidence is not admissible to prove that the defendant informed other creditors, when they lent money to the corporation, that its members were individually liable for its debts, and showed them a by-law of the corporation imposing such liability.

An oral promise of a member of a corporation to pay its debts will not bind him; such promise being within the statute of frauds.

This was an action of assumpsit, to recover the amount of the following note: "Andover, August 1st 1836. The Andover Mechanic Association, for value received, promise to pay to the Trustees of the Free Schools in the South Parish in Andover, or their order, three hundred ninety eight dollars, forty one cents, on demand with interest. John Flint, Treasurer." On the back of this note were six indorsements of a year's interest; the last indorsement bearing date October 4th 1842.

The parties submitted the case to the court upon the following agreed statement of facts: The plaintiffs were incorporated by *St.* 1801, *c.* 9. The Andover Mechanic Association was incorporated by *St.* 1821, *c.* 40, "with power," among other things, "to make by-laws for the management of said corporation and its funds, and to have all the privileges usually given, by acts of incorporation, to charitable societies." On the 27th of February 1822, at a meeting of said association, certain by-laws were adopted, which were afterwards printed and distributed, the eleventh article of which was in these words: "The members of this association pledge themselves, in their individual as well as their collective capacity, to be responsible for all moneys loaned to this association, and for payment of which the treasurer may have given his obligation agreeably to the direction of the directors."

The plaintiffs recovered judgment against said association,

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on the note which is now sought to be enforced against the defendant, and took out execution on said judgment, which execution was returned wholly unsatisfied, before the commencement of this action. Before this action was commenced, to wit, on the 16th of October 1845, the plaintiffs made a demand on the defendant, as a member of said association, to pay the sum now sought to be recovered. The defendant has been a member of said association from the time of its organization to the present time, and was treasurer thereof from its organization to the 1st of January 1840. The number of the members of said association is about thirty.

The plaintiffs offer to prove, (if the proof be admissible,) by one witness, that she was a creditor of said association; that her demand remained unpaid; that when she lent money to said association, the defendant was treasurer; that she inquired of him as to the security of said corporation, and that he, in reply, informed her that the individual members of said association were liable for its debts; and that the same statement was made to her by the defendant's successor in the office of treasurer.

The plaintiffs also offer to prove by another creditor of said corporation, that when he made a loan to said corporation, the defendant was treasurer, and that he stated to the witness that he considered the individual members of the corporation liable for its debts, and at the same time furnished the witness with a copy of the said by-laws: That the witness gave said copy to another person, who will testify that he afterwards made a loan to said corporation, being induced by, and under the supposition of, the liability of the members.

The plaintiffs also offer to prove, by the testimony of a member of said association, that he and the other members thereof, so far as he knows, considered themselves liable individually for its debts; that he had attended their meetings, at which he had heard the subject spoken of by members; but that he does not know whether the defendant was present at those meetings.

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The said association, on the 25th of April 1845, made an assignment for the benefit of its creditors; but the plaintiffs refused to become parties thereto.

At the time of the loan of the money sought to be recovered in this action, the defendant was treasurer of the Trustees of the Free Schools in the South Parish in Andover, (the plaintiffs,) as well as treasurer of the said Andover Mechanic Association. He resigned the office of treasurer of the plaintiffs on the 12th of December 1836.

If the aforesaid testimony be admissible, the court may draw the same conclusions therefrom which a jury would be bound to draw.

Stevens, for the plaintiffs.

Hazen, for the defendant.

DEWEY, J. The original contract was made by the plaintiffs with the Andover Mechanic Association. The plaintiffs received, for the money lent to that corporation, their negotiable note duly signed by their treasurer. Such was the form of the contract, and such has been the character given to the original promise, in the subsequent steps taken by the plaintiffs to enforce the collection of this demand. No liability, on the part of the defendant, arises from the force of the instrument given to the plaintiffs; but, if it exist at all, it is to be established by independent facts creating such liability, or by some legal enactment charging the defendant for the debts of the corporation.

Upon looking at the act incorporating the Andover Mechanic Association, (*St.* 1821, *c.* 40,) we find it in the usual form of acts of incorporation, giving a corporate name and corporate powers, but imposing no individual liability on its members for the debts of the corporation. Individual liability, as incident to membership of a corporation, arises only from express legislative enactment, either in the charter, or by some general law, to which all similar corporations and their individual members are made subject. But there is no general law applicable to this species of corporations, such as exists in

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reference to manufacturing corporations, or corporations for banking purposes, providing certain liabilities on the individual stockholders of such corporations, in certain specified cases.

The plaintiffs, aware of this difficulty in any attempt to charge the defendant, by force of the provisions in the act of incorporation, or by reason of any general law imposing such liability on the defendant for the debts of the corporation, seek to establish their right to recover, in the present action, upon other grounds. For this purpose they rely upon the eleventh article of the by-laws of the corporation, adopted by its members soon after the passing of the act of incorporation. That by-law is in these words: [Here the judge recited the by-law, as set forth, *ante*, page 539.] The only effect that can be given to this by-law is that of an act or vote of the members of the corporation acting in their corporate capacity. It is not the act of any individual member, nor does the fact of its being found upon the records of the corporation, as a vote duly adopted, authorize the inference that all or that any number greater than a bare majority voted for its adoption. The question then arises, whether it be competent for an aggregate corporation, whose act of incorporation imposes no individual liability upon its members for the debts and contracts of such corporation, to render, by force of a by-law, each individual member a guanrator or surety for all moneys lent to the corporation. It is clearly quite foreign from the general purposes and objects, in reference to which by-laws are authorized to be made by corporate bodies. See Rev. Sts. c. 44, § 2, giving authority to corporations to make by-laws.

It is not, in the opinion of the court, within the corporate powers conferred upon this and similar corporations, to impose upon their members, by any such by-law, any personal and individual liability to third persons, beyond such as are specified in the charter, or in the general laws of the Commonwealth. Such a power would be liable to great abuse, and would subject every member of a corporation, however liberal

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its charter in excluding individual liability, to be made responsible for the entire indebtedness of the corporation by the act of a majority of those convened at a meeting of such corporation. Take the case of a bank in doubtful credit, and its active managers deem it useful to sustain it by pledging the individual responsibility of some of its more wealthy stockholders. Can they, by a corporate vote, impose upon all the stockholders a personal liability for all the debts of the corporation? We think not, and are of opinion that each stockholder, by becoming such, subjects himself to no liability beyond that created by the force of the charter itself, or declared by other statutes of the Commonwealth.

Nor does the proposed evidence of the declarations of the defendant, that such individual liability existed in the present case, authorize the maintaining of this action. He might have mistaken his legal rights; he might have supposed such would be the effect of the by-law referred to, and therefore have made the admission. It is to be borne in mind that these declarations of the defendant were not made to the plaintiffs, but to other persons. The proposed evidence would therefore be inadmissible on a trial of this case before a jury; as it would not tend to charge the defendant. Whether for such false representations he may be held responsible to those to whom he made them, and who may have lent their money upon the faith of them, is a question not now before us. It is a fatal objection to the maintenance of the present action, that the defendant has never, by any valid legal contract, bound himself individually for the payment of the loan made by the plaintiffs to the Mechanic Association. His name was never subscribed to the pledge of the corporation, that the individual members would guaranty the debts of the corporation. His oral promises, if made, would be inoperative and void, by reason of the statute of frauds. To give any legal effect to these pledges of individual liability, they must have been the individual acts of the members, adopted and sanctioned by them by their signatures, under their own hands. Without this, the corporate act was a dead letter, and of no

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binding efficacy upon individual members in their personal capacity.

We see no ground upon which this action can be maintained. *Judgment for the defendant*

Inhabitants of Salem *vs.* Inhabitants of Lynn.

On the trial of an action brought by one town against another, to recover expenses incurred for the support of a pauper who was alleged to have acquired a settlement in the defendant town by residing there ten years together, and paying taxes for five of those years, it appeared that the pauper had removed to a third town, during the ten years, and remained there a short time, and then returned to the defendant town. *Held*, that the pauper's statements, made immediately after his return, as to his intention, when he removed, could not be received in evidence. *Aliter* as to his statements, made after he formed the intention of removing, and at or about the time of his removal.

Assumpsit to recover the expenses incurred by the plaintiffs in supporting a pauper whose settlement was alleged to be in the town of Lynn.

At the trial in the court of common pleas, before *Wells*, C. J. the plaintiffs undertook to prove that the pauper gained a setlement in Lynn, under the Rev. Sts. *c.* 45, § 1, by her husband's residing there for the space of ten years together, and paying all taxes duly assessed on him for five of those years. It was in evidence that her husband, William Stanwood, removed from Lynn to Marblehead, where he remained about four months, and then returned to Lynn; and the question was submitted to the jury, whether said William thus removed from Lynn with an intention of returning thereto.* To prove such intention, the defendants offered to show his statements, made immediately after his return to Lynn. But the judge ruled that the inquiry must be confined to such declarations as were made by said Stanwood after he nad formed the intention of removing from Lynn, at and about

* See *Billerica* v. *Chelmsford*, 10 Mass. 396

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the time of his said removal, and while remaining in Marblehead; and the judge excluded the defendants' question as to the declarations of said Stanwood after he had returned to Lynn.

The jury found a verdict for the plaintiffs, and the defendants alleged exceptions to the said rulings.

Stickney, for the defendants, cited *West Cambridge* v. *Lexington*, 2 Pick. 536; *New England Marine Ins. Co.* v. *De Wolf*, 8 Pick. 56; *Thorndike* v. *City of Boston*, 1 Met. 242; and *Kilburn* v. *Bennett*, 3 Met. 199.

Perkins, for the plaintiffs. In the case cited from 2 Pick. 536, the declaration of the party was admitted on the ground that it was a declaration against his interest; and in 1 Met. 242, the declarations of the plaintiff, which were held admissible, were made before, and not after, his return to Boston. The declarations of Stanwood, which were rejected at the trial, were not part of the *res gesta*, and do not appear to have accompanied any act. See 1 Greenl. on Ev. § 108. *Inhabitants of Gorham* v. *Inhabitants of Canton*, 5 Greenl. 266

Dewey, J. The proposed evidence of the declarations of Stanwood was clearly incompetent. The declarations of a party to an act are, under proper limitations, competent evidence to show the intention of such party, in reference to such act. If made at the same time with the act, they may be considered as a part of the *res gesta*, and so admissible. Somewhat greater latitude is allowed, in reference to the time of making such declarations, where the question relates to the domicil of the party at a particular period. The cases of *Thorndike* v. *City of Boston*, 1 Met. 242, and *Kilburn* v. *Bennett*, 3 Met. 199, cited by the defendants' counsel, were unlike the present, and do not furnish any authority to sustain the exceptions to the ruling of the court of common pleas. The declarations, proposed to be offered in evidence here, were not made by a party while doing any act, but were a recital of past transactions and past purposes. They were not explanatory of an act about to be done, nor made in

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reference to any future action; but they were merely declarations in relation to a past transaction, and they fell clearly within the ruling of this court, in the case of *Haynes* v. *Rutter*, 24 Pick. 242. *Exceptions overruled.*

DANIEL A. WHITE, Judge, &c. *vs.* JAMES B. SAWYER & others.

A testator, by one clause in his will, gave to his wife the use of all his property, real and personal, except one hundred dollars, as long as she should remain his widow; and in the next clause, he declared his will to be, that all his property, which should remain, after the death of his wife, or after she should cease to be his widow, should be divided equally among his children: *Held*, that the wife was entitled only to the interest of the money remaining in the executor's hands, after settlement of his administration account, and that he was to hold the principal during the wife's life or widowhood, as trustee for the children.

THIS was an action of debt on a bond, given to the judge of probate, by James B. Sawyer, executor of the last will of Leonard Sawyer, and by the other defendants, as sureties of said James B., conditioned as required by the Rev. Sts. *c.* 63, § 2. The action was brought for the benefit of Abigail Sawyer, the widow of said Leonard, the testator, and was submitted to the court on the following facts agreed:

The second clause in the will of Leonard Sawyer was thus: "I give and bequeath to my beloved wife the use of all my estate, both real and personal, as long as she shall remain my widow, excepting one hundred dollars, which I wish my executor to pay in money to my daughter, Susan B. Sawyer, when she shall call for it after my decease, and which hundred dollars is to be deducted from her distributive share in my estate."

The third clause in said will was thus: "My will is, that all my estate, which shall remain after the death of my said wife, or after she shall cease to be my widow, shall be divided equally among my children, James B. Sawyer, Abigail Goodrich, Leonard Sawyer, Susan B. Sawyer, William Sawyer and Joseph W. Sawyer"

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Said executor has rendered an account of his administration of the testator's estate, by which it appears that there is a balance in his hands; and this account has been allowed by the judge of probate. If any thing is to be paid over by said executor to said widow, it is agreed that it is the balance of said account as settled and allowed in the probate court.

If, from the terms of the said will, this action can be maintained, the defendants are to be defaulted; otherwise, the plaintiff is to become nonsuit.

N. J. Lord, for the plaintiff.

Holbrook, for the defendants.

WILDE, J. This case depends upon the construction to be given to the last will and testament of Leonard Sawyer, by which he gave and bequeathed to his wife the use of all his estate, both real and personal, as long as she should remain his widow, excepting one hundred dollars. By a subsequent clause in the will, he gave all his estate, which should remain after the death of his wife, or after she should cease to be his widow, to his children. Under these clauses of the will, the plaintiff claims of the executor the balance of his account, as settled and allowed in the probate office.

It is contended for the plaintiff, that the widow took an estate for life in the real and personal estate, and that she is entitled to the use and possession of both, during her life, or until she shall cease to be the widow of the testator. This may be admitted as to the real estate, and also as to the personal estate, excepting the money in the hands of the executor; but as to that, we think, the executor is to be considered as a trustee, by a plain implication in the will, to hold the principal, during the wife's life or widowhood, for the children; and that she is only entitled to the interest. It was manifestly the intention of the testator to give to his wife the income of his estate only. The case cannot be distinguished in principle from *Saunderson* v. *Stearns*, 6 Mass. 37; *Hall* v. *Cushing*, 9 Pick. 395; and *Nash* v. *Cutler*, 19 Pick. 67.

Plaintiff nonsuit.

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SUPPLEMENT.

THE Honorable SAMUEL HUBBARD, a Justice of the Supreme Judicial Court, died on the 24th of December, 1847. The Bar of Suffolk, on the 26th of December, convened and passed resolutions, which were presented to the court on the next day, by Charles G. Loring, Esq. Before presenting them, Mr. Loring addressed the court as follows:

MAY IT PLEASE YOUR HONORS:

I am instructed, by the members of the Bar of Suffolk, to present to the Court, Resolutions passed at a recent meeting, expressive of their feelings upon the deeply afflicting bereavement, which the Court and Bar, and whole community, have sustained in the death of SAMUEL HUBBARD.

When a great and good man, occupying one of the highest stations of trust and honor in the power of his fellow men to bestow, and fulfilling its duties with exemplary ability and fidelity, and the universal acceptance of all within the sphere of its influence, is taken from among us, not only justice to the memory of the dead, but a due regard to public sentiment and self-respect, alike demand that we pause from our accustomed labor, in solemn recognition of the event, and avail ourselves of the only opportunity remaining to us, as an association, of rendering a tribute of affectionate and reverential regard to his usefulness and worth.

And when to the attributes of the exemplary and exalted magistrate are added those of the philanthropist, glowing with the spirit of universal benevolence, of the fervent, humble Christian, and the delightful, affectionate and instructive friend, illustrated to so many of us in the intercourse of private life, the full heart can find no utterance for the feelings with which it is oppressed.

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The departure of one who has worthily filled a seat upon the bench of this court must ever be, to those engaged in the arduous service of the bar, a subject of deep regret; and when caused by death, of profound emotion. We shrink from the thought, that the ruling mind which has so often illumined our path in the perplexities and intricacies of judicial trial; so clearly pointed out the guiding star of truth in the midst of doubt and uncertainty; so firmly held the scales of impartial justice in the agitations of passion and heat of argument; and so kindly poured the oil of peace upon the troubled waters of controversy, — is forever withdrawn, and shall enlighten, guide and encourage us no more.

It may be safely said, that with us there is no station in life which, in the faithful administration of its duties, secures a more widely extended, true and deep-hearted loyalty of affection and respect, than that of the judicial magistrate. And it is to be regarded as one of the chief glories and safeguards of our Commonwealth, that its long succession of highly gifted and eminently virtuous judges have deeply implanted this sentiment in the public mind, and thus far rendered secure the only foundation upon which the safety of a republic can rest. And may Heaven grant that neither cause nor effect may ever cease.

The history of his life whose death we now deplore — like that of most eminent lawyers — is briefly told; and like theirs will be but briefly remembered, after those of us who knew him personally shall have also passed away.

It is often, indeed, lamented as the misfortune or hard lot of our profession, that talents and learning, and intellectual effort, and moral courage, which, if exhibited on the field of battle, or in the halls of legislation, or the investigations of science, or cultivation of letters, or the arts, would secure a world-wide and deathless fame, — with us perish in the using, and are expended on subjects of transitory and often of trifling importance. And if to wear a laurel, or gain the lasting reputation of a name, were "our being's end and aim," the complaint would be indeed reasonable; and the contrast of our occupation with those of the soldier, philosopher or scholar, might awaken feelings of poignant regret, if they should not deter the gifted and earnest from entering our ranks.

But motives thus terminating in personal ambition are not those which our position or destination point to as first to be cherished, or as best suited for animating us in the discharge of duty; and least of all were they those which inspired the heart and strengthened the hands of him at whose grave we now stand.

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Surely those whose mission it is to assist in laying broad and deep the foundations, or erecting or guarding the superstructure, of social security and duty, and to toil and struggle with exhausting energy and fearless resolution in vindication of the rights of property, liberty and life, — and it may be at the sacrifice of their own, — need not fear comparison of their services with those of the battle field, the council chamber, the study or the library; and the true-hearted lawyer, if conscious that, by a life of faithful devotion to the high duties of his profession, he is erecting a pillar in the temple of humanity or justice, will not sigh, nor think his work incomplete, because he may not be permitted to inscribe upon it his name.

The resolutions I am commissioned to present to the court are expressive of the sentiments of the bar in reference to the professional, judicial and social character and services of Judge Hubbard; and briefly point to the leading characteristics which he displayed in these departments of life and duty.

He was born in this city, in the year 1785; was graduated at Yale College in 1802; pursued the study of the law in the office of Judge Chauncey, of New Haven, for two years; when he returned to this place, and entered the office of the Hon. Charles Jackson, then one of the most distinguished lawyers of the State; was admitted to the bar in this county in 1806, and entered upon professional practice in Maine, then a portion of this Commonwealth, in which he continued with good success until the year 1811; when he again returned here, and formed a professional connection with his instructor, which continued until the appointment of Mr. Jackson to the bench of this court, in the year 1813.

That instructor and friend survives him, and honors his memory by uniting with us on this occasion; and long may it be before it shall be fitting to speak of his character and services, as a jurist and a man, in the terms which justice would require, but which grateful recollections of the departed can alone permit.

Mr. Hubbard soon rose to the highest rank in the profession, both as a counsellor and advocate, and became engaged in the most extensive and laborious practice. His friendly, unassuming manners, his patience of investigation, his learning, his rare sagacity, his quick penetration of character, his almost unexampled power of analysis, and his entire fidelity and devotion to the duties he assumed, commanded the universal confidence and respect of the court, the bar, and the public. And it may be well doubted whether any practitioner in the State ever possessed more entirely the trust and friendship of his clients

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In the management of trials before the Jury, he was distinguished for his minute and careful knowledge of every fact and circumstance, and every point of law and evidence that could be anticipated to arise; for a peculiar penetrating sagacity in seizing upon the weak positions of his adversary's case, and the strong ones of his own; for the clearness and discrimination with which he arrayed his points of law and fact, and the adroitness and honest earnestness of conviction with which he pressed them upon the jury, — rather than for great powers of generalization, or comprehensive scope of argument, or verbal eloquence; although at times, when under excitement in the belief that he was contending with false testimony or intended wrong, his appeals to the mind and heart might be ranked among the happiest efforts of eloquent men.

His arguments to the court in bench were characterized by entire mastery of the learning applicable to the subject, perfect apprehension of the turning points of the case, and clear, sagacious, truthful and ingenious application of the principles upon which its decision should depend.

To you, Mr. Chief Justice, who were so long his compeer, and so long and often alternated with him as the Achilles and Hector of the forum; and to your honored and revered associate, who presided over so many of his professional efforts during his whole career at the Bar; to those around me who were engaged by his side or in the conflict with him, and to me who had the privilege of completing my studies under his guidance, and entering the forensic arena under his auspices as his associate in the profession, — to all of us, how grateful and refreshing will ever be the recollection of the kind manners, the honest love of truth, and gentleness of spirit with which he exercised his high powers; and which tended so greatly to mitigate the asperities of controversy, allay the suspicions of injustice, and calm the hasty emotions of inflamed and agitated hearts, — and how earnestly may we invoke the influence of his example upon those of us who still labor here, and those who are to come after us.

After a long and most honorable and successful career in the practice of the law, he had in a great measure retired from it for a few years preceding his elevation to the bench in 1842; when he was called to occupy the seat made vacant by the resignation of one who had filled it for nearly thirty years with devoted fidelity, — but of whom or whose services it does not become me, as it might another, to speak, though I may be pardoned in alluding to them in confirmation of my remarks upon the influence of the judicial office, as

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illustrated in the universal affection and respect which illumine the path of his declining age.

How ably, how faithfully and how acceptably Judge Hubbard discharged the duties of this high and arduous station, no words need now or here attempt to tell. The universal grief pervading the court and bar, and the public mind throughout the Commonwealth, in the consciousness of their irreparable loss, is the most effective comment, and his most eloquent eulogy.

The term of his service has been indeed of short duration, but sufficient to evince the wisdom of the appointment; to establish his claim to be ranked among the most wise, accomplished, faithful and popular of judges; to impress upon the profession and the people an affectionate and reverential regard for his name, and to strengthen and elevate the highest judicial tribunal of his native State; while the reports of his judicial opinions will hand down to posterity the characteristic traits of his mind as illustrated in his professional career; though they can do nothing to perpetuate those graces of the heart and life which made him so dear to his contemporaries, and now give such poignancy to our grief.

In his social relations it is difficult to speak of the deceased in terms that shall not be accounted the exaggerated eulogium of bereaved friendship. The private virtues and graces of the husband, father, relative, and domestic friend, are not of a nature for public display, — even if susceptible of delineation in words. They are as the mellow sunshine and falling dew which sustain and refresh life, but which no pencil can depicture nor tongue describe. These must be left for the private communings of each one's own heart.

But we may speak of his prompt and efficient services in the legislative halls of the State, when duty called him there; of his ever-wise and active benevolence abroad; of his unostentatious charity to those who sought his aid in counsel or in alms; of his unwearied services in the great causes of religion and moral reformation, as a leading member and officer of many public and private associations for these purposes; of the weight of his influence and example as a member of the Christian church; and of the never-failing fulness of mind and heart, and simplicity of manner, that shed such sunlight upon the social circle or friendly interview; of these we may speak, not, however, in the language of repining sorrow or unmanly grief, but in thankfulness that they have been vouchsafed so long, and in the happy confidence that their influences shall never die.

I have said that the life of a lawyer, however eminent and faithful is briefly told, and must usually be but briefly remembered. This

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however, is not all that should be said; it is only the least that can be predicated of his being. It is his fame alone that dies. His sleepless vigils in the mastery or application of the science of his profession; his exhausting and wasting efforts in the arduous conflicts of the bar; his patience, fidelity, impartiality and truthfulness as a judge; his self-devotion to duty, and sacrifice of all else dear to him in its performance; even his name may be without record, and forgotten as a summer shower or winter's storm; but the influences and effects of those efforts, and toils, and sacrifices, and example, will never cease, nor know limitation of time. As we learn that no vibration in the material world ever terminates, but that each keeps on in undying effect through endless ages, so shall the influences of the great and good in the moral world vibrate through time and eternity, in the elevation and advancement of the human soul, although not inscribed with their names, and bearing no record of their lives.

These resolutions, may it please your Honors, also transmit the message of our sympathy to the bereaved family of our departed brother. But into that stricken home we cannot enter. There, indeed, "the heart knoweth its own bitterness," and the stranger may not intrude. But while we sympathize with them in their sorrow, we may find consolation with them, and incitement to faithful discharge of the duties before us, in the assurance that the good man never dies, either in himself or his works, but that they follow him here and in the higher world to which he ascends.

Mr. Loring then presented the following Resolutions:

Resolved, That the members of the Bar of Suffolk contemplate with profound grief the death of the Hon. SAMUEL HUBBARD, one of the Justices of the Supreme Judicial Court of this Commonwealth.

Resolved, That we cherish in grateful and affectionate remembrance the ability, learning, fidelity and urbanity displayed in the discharge of his duties as a member of this Bar, of which he was for many years a distinguished leader and ornament; and by which he conspicuously illustrated the virtues and manners of a Christian lawyer and advocate.

Resolved, That in his removal from the Bench, the Commonwealth is bereaved of a most able, learned, faithful and impartial magistrate; whose administration of her laws, inspiring universal confidence and respect, was daily adding strength to the principles and institutions upon which the happiness, security and honor of her citizens repose.

Resolved, That in his departure, society has lost one of its most

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valued friends and guides, whom fervent piety, eminent ability and virtue, kindness of heart, and simplicity of manners, had invested with peculiar confidence, affection and respect.

Resolved, That we sympathize with the family and relatives of the deceased in this their extreme affliction; but rejoicing with them in the belief, that he has only passed on to a higher and hc er sphere of happiness and duty.

Resolved, That these resolutions be transmitted to the Supreme Judicial Court, now in session in this county, with a request that they may be entered upon its records, as permanent testimonials of the sentiments of this bar upon this occasion.

Resolved, That the members of the bar will attend upon the funeral obsequies of the deceased, if such arrangement be acceptable to the family.

Resolved, That the chairman and secretary be instructed to communicate a copy of these Resolutions to the family of the deceased.

Chief Justice Shaw responded to the resolutions, as follows:

GENTLEMEN OF THE BAR:

With feelings of deep and heartfelt sorrow, in perfect accordance with the sentiments expressed in your resolutions, now offered, and in acceding, as we cheerfully do, to your request, to give a permanent and lasting expression to those sentiments, by entering them on the records of the court, we desire to testify, in the simplest form, our own deep sense of the loss which this court has suffered, in the lamented death of one of its members. Deprived, by a sudden and unexpected bereavement, of the aid and assistance, the support and comfort, of one with whom we have so long been associated, in the performance of important duties, in sustaining and participating in the high responsibilities of judicial office, it becomes those who survive to pause, to yield, in humble submission and devout trust to this dispensation of Divine Providence, and to submit our hearts to the solemn impressions which so near a bereavement cannot fail to make. It becomes us, even in the midst of the most active and arduous duties, to pause, and reflect on the afflictive event by which the youngest in official standing is suddenly taken from among us; to consider how short a time it is since the now vacant seat of this tribunal was filled by one beloved and respected, in the fulness of mature life, in the performance of the same duties, under a high and conscientious sense of the weight of responsibility which they imposed upon him. But he is gone, and the place that knew him shall know

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him no more forever. To the heart, the death of an associate, in the midst of usefulness, so beloved, respected and trusted, comes suddenly, come when it may. And whilst we bow in reverent submission to that Divine Wisdom whose mandates are always right, we are permitted, by the wise and beneficent Author of our being, to indulge in those subdued feelings of sorrow, which seek to pour themselves forth in sympathy for the bereaved, in affectionate recollections of all that was kind, exemplary and praiseworthy in our lamented friend, in a grateful acknowledgment of the benevolence and warmth of affection which manifested itself to his family, to his associates in private and public life, and in a just commemoration of his conscientious devotion to duty, and eminent public services. Such a cherished remembrance of the virtues and services of a good man, whilst it is a just tribute to the memory of him who has passed away, is filled with lessons of wisdom for those who survive. The life of a good man does not cease with the last expiring breath that animated him; it lives in those affections which his kindness of feeling and warmth of heart have kindled in others — in the bright example, which his strength of moral principle, his conscientious regard to duty, his abiding and sustaining religious faith, have set to others; in the incentives to moral excellence and honorable effort, which are afforded to all, especially to the young, by the universal respect and veneration which attend the loss of such a man. Feelings of grief, under a sense of recent and heavy bereavement, need not, cannot be wholly repressed; they must and they should have utterance. There are times when it is better to go to the house of mourning than to the house of feasting, and by it the heart is made better. The chastened grief which we are permitted to indulge, if rightly directed, may not be without its salutary uses. Through its softening influence, the life and character of the amiable and excellent, of the wise and the good, who have lived in virtue, and departed in faith and in hope, shall long continue to speak, in tones of love, of wisdom and encouragement, more affecting and abiding than those of living language, to the feelings and consciences of all those who may wisely lay it to heart.

These, and thoughts like these, too numerous for utterance, rise spontaneously to our minds, and fill our hearts with sadness, when, after the first shock is over, we are called to reflect upon the lamented death of Samuel Hubbard, late an honored member of this court. And we do most cordially and sincerely unite with the members of the bar in the sentiment of profound grief with which they have contemplated the death of Judge Hubbard, in grateful and affectionate

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remembrance of his conduct as an eminent and faithful Christian lawyer and advocate, and as a learned, faithful and impartial judge. But we are not only called on, by this sad event, to lament the loss of a talented and eminent advocate, of a learned and upright judge, but, with the whole community, to mourn the departure of a man whose philanthropy was comprehensive enough to embrace all the great interests and institutions of humanity and religion, whose benevolence was carried out into useful and extensive action, and whose principles were sanctioned and adorned by a pure, pious and well ordered life.

Judge Hubbard was born in Boston, in June 1785. Whilst he was yet young, his parents removed to Connecticut, where his youth was passed and his education principally acquired. He took his degree at Yale College in 1802, at the early age of eighteen, studied law about two years at New Haven, and then came to Boston, and completed his legal studies with Hon. Charles Jackson. He commenced practice in the county of York, then the District of Maine, and, after a few years there, returned to Boston. After his return, he entered into partnership with Judge Jackson, and remained with him until that gentleman retired from the practice of his profession, to take his seat as a member of this court. From that time he remained in full and extensive practice, until he himself was called to the same office. To this office he was appointed by Governor Davis, in 1842, on the retirement of one,* who had long performed the duties of that office with eminent learning and ability; who brought to the performance of those duties the results of long experience and the fruits of laborious and well directed research, an integrity and purity of purpose which commanded the respect and admiration of the community; and who, by the kindness of his heart and the amenity of his manners, won the affectionate respect of all those who had occasion to approach him. I feel that I do but express the general sentiment of this bar, and that of the Commonwealth, — I hope this may be considered no unfit occasion for expressing it, — a feeling of grateful acknowledgment to Heaven that he still lives; lives to grace with the virtues of private life the community who long enjoyed, in the strength of his years, the benefits of his judicial labors.

From the time that Judge Hubbard became permanently settled in Boston, his life has been before the public. As a counsellor and advocate, he was extensively employed and trusted; and he devoted himself to his professional duties with a fidelity and assiduity which showed how worthy he was of the trust reposed in him. He was

* Judge Putnam.

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remarkable among his contemporaries for his power of patient and thorough investigation, which enabled him to unravel the most compli cated cases, and to point out clearly to others the true points on which the merits of an intricate controversy turned. Practising in a mercantile community, in a time when great interests, growing out of commerce and navigation, were brought into controversy, his mind was thoroughly imbued with a knowledge of mercantile law; not merely the municipal law, which governs one state or one country, but that qualified international law, which for general convenience, and almost by general consent, governs the commercial world. He could readily bring to his aid, in questions arising out of either foreign or domestic commerce, that mass of usages and customs founded in considerations of right and expediency, and sanctioned and confirmed by the frequent decisions of courts of justice, designated as the law merchant. His knowledge in these respects, and his practical skill in accounts, applied under the aid of well known and well settled rules of law, familiar to his mind, gave him a preëminence in this class of legal investigations, which was felt and acknowledged by those who were associated with him, as well as by the courts and juries to whom they were presented. In the discussion of legal questions, his arguments were marked by legal discrimination and a fulness of authorities which indicated that no industry had been spared in bringing to the support of his cause all the aid which books could furnish. His example may be justly held up for imitation, especially to young men looking forward to success in the legal profession. With an originally good understanding, enriched and matured by patient and persevering study, and trained by reflection to habits of acute legal discrimination, he entered upon his duties as a counsellor and advocate with the fidelity and firmness of purpose which left nothing undone which patient research could accomplish, in the matter either of fact or of law, to advance the interests and establish the rights of his client. The rights of his clients, therefore, were safe in his hands and were felt to be so. If they had merits, they were fully pre sented; and if not always successful, it was because, in every controverted question of right, both parties cannot prevail.

The judicial qualities of Judge Hubbard, during the few years that he has held this office, have been too conspicuous, and too highly appreciated, to require any remarks at this time. Coming to the bench, as he did, in the full maturity of his powers, after a long course of study and practice, thoroughly acquainted with the rules and princ'ples of law in all its departments, and familiar with all the

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forms of proceeding, he needed no preparation, but was ready to enter at once upon the duties of a judge. The same qualities of mind, the same acute and persevering investigation, which have been already noticed, were brought to bear here with eminent success; with this difference, however, that, as a counsellor, he was to investigate the merits on one side only, and when that was done, his duty was performed; whereas, here, after investigation has ended, after all the light is thrown upon the subject which examination and research can throw, there remained the delicate and difficult duty of judging between conflicting and nearly balanced claims of right, either of which, standing alone, would seem to be well sustained. How cautiously he approached this duty, how conscientiously he performed it, how firmly and fearlessly he adhered to a judgment formed under all the lights which examination could give, those of us who have witnessed the operations of his mind, and shared his counsels in the unreserved confidence of consultation upon great interests and difficult questions, can readily and cordially testify. It has sometimes been said, that in the conduct of trials he has been slow; but we think it will be found, that wherever a trial has taken a considerable time, it will be shown to have arisen from an anxious desire on the part of the judge to hear patiently all that could be said on both sides, to follow out every line of examination which either might think it best to open, and to close up no path of inquiry which might seem to lead to the truth and right; acting upon an honest belief, that truth and right, as far as they can be attained by human means, are the great and ultimate objects of judicial aim; and that where both objects cannot be accomplished, it is better that a judgment should be right than that it should be speedily given. But it is not my purpose to dwell on his judicial merits. His judicial career is now done; many of his opinions are before the world. Those who have duly appreciated his integrity and purity of purpose, his treasures of legal knowledge, his uprightness and impartiality, and that urbanity of manners, which sprung from a pure benevolence and kindness of heart, well know how severe a loss the judiciary of Massachusetts has sustained in the death of Samuel Hubbard.

Judge Hubbard, before his appointment to a seat in this court, had at times, but not constantly, been engaged in public life. He had occasionally been a member of one or other of the branches of the state legislature; and we think it will appear that those periods have been marked by some manifest improvements in the statute law of

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the Commonwealth. He was a member of the state convention, called to amend the constitution, after the separation of Maine, and took a part in the debates of that body, which embraced men of the highest order of talent and wisdom. His attention there was mainly directed — as might have been anticipated from the well known tendencies and habits of his mind, and his conscientious adherence to the principles of Christianity — to those provisions of the constitution which might secure an effectual provision for the maintenance of public worship, and give strength and stability to all religious institutions, so that, under the smiles of Providence, it might long continue to be, what its pious founders designed it to be, a Christian Commonwealth.

Indeed, his strong and sincere devotion to religious truth and duty, in all the private as well as public relations of life, constituted too important a part of his character to be overlooked, even in this brief and hasty sketch. He had a firm and unshaken faith in the being and promises of God, and in the truth and reality of those assurances offered by Christianity to the human soul. Without overlooking or undervaluing the requirements of social duty, or the objects and purposes of the present life, he believed there were objects and purposes of still higher and more lasting importance; and looking for their accomplishment in a future state of existence, through the redemption offered by Christianity to man, he was ready and forward to employ his time and talents, to give the aid of his counsel and example, in advancing all the means which might enable others to attain the like precious faith. In the great enterprise of sending the light of Christianity into the lands over which the sun of the gospel has never risen, he labored long, and faithfully coöperated, in the confident hope that at some future day the enlightening influence of the Christian religion may be known and felt throughout all lands. Such was the power of this blessed faith over his own heart and life, that it enabled him to bear the severest trials with fortitude and composure; that it could light up a smile of contentment and peace upon that benignant countenance, over which the shadows of the tomb were fast gathering, and sustain him in his last hours, in committing himself, and all he held dear, to the protection of the heavenly Father in whom he had trusted.

To the family and numerous relatives and friends of the deceased, we can do no more than offer an expression of our heartfelt sympathy. May we all return from this solemn meeting to our respective scenes and departments of duty, animated, by the example of our deceased

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friend, to higher and more conscientious motives to do that duty well; may we be quickened, by his life and by his death, to make preparation for our own great change, which must soon follow. And when it does come, may we participate with him in that encouraging benediction, "Blessed are the dead who die in the Lord, for they rest from their labors, and their works do follow them."

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ACTION.

An action cannot be maintained on a bond, which is executed, neither from necessity nor charity, on the Lord's day. *Pattee* v. *Greely*, 284.

ADMINISTRATOR.

See EXECUTOR, &c.

AMENDMENT.

1. The test of a writ may be amended in any stage of a cause, by substituting the name of the first justice of the court, who is not a party, in place of another name erroneously inserted. *Nash* v. *Brophy*, 476.
2. A writ, in which the amount of the plaintiff's damages is wholly omitted, may be amended, by leave of the court, by filling the blank with the proper sum. *Cragin* v. *Warfield*, 215.
3. A writ of entry, brought by a mortgagee, in the court of common pleas, in the form allowed by Rev. Sts. c. 107, § 3, may be amended, so as to show that the demandant claims possession against the tenant, under a mortgage. *Blanchard* v. *Kimball*, 300.
4. When there are two counts in a declaration, and the jury bring in a verdict for the plaintiff on one count, and state that they cannot agree upon a verdict on the other, the court has authority to permit the plaintiff to amend by striking out the other count, and to allow the jury to return their verdict generally for the plaintiff. *Soule* v. *Russell*, 436.

See VERDICT, 1.

APPRENTICE.

An indenture, by which the child of a town pauper in Rhode Island is bound by the overseers of the poor of the town, conformably to the law of that State, as an apprentice to a citizen of this State, is not valid here, and does not constitute a bar to an action brought here, by the person so bound, to recover of the person, to whom he was bound, payment for labor done during the time for which he was bound. *Himes* v. *Howes*, 80.

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ARBITRAMENT AND AWARD.

1 P. and R. made a written submission to arbitrators of all accounts, claims and demands which they had against each other, of whatever name or nature; all which claims they agreed to make respectively, each against the other, before the arbitrators, who should consider the same, and whose report should be final: At the time of the submission, there were conflicting claims, between P. and R., respecting certain real estate, and these claims were laid by them before the arbitrators, who awarded, in full of all matters submitted, (among other things,) that R. should convey to P., his heirs and assigns forever, by a deed of warranty, a certain strip of land, and should execute a deed, releasing to P. all R.'s right and estate in a certain passage way, to which land and passage way they had conflicting claims. *Held*, that the terms of the submission included the parties' claims concerning real as well as personal property; that the arbitrators were thereby authorized to direct R. to make such deeds; and that P. might maintain a bill in equity to enforce specific performance, by R., of that part of the award. *Penniman* v. *Rodman*, 382.

2. When a matter, not pending in court, is submitted to arbitration, by an agreement *in pais*, and not pursuant to the Rev. Sts. c. 114, and no provision concerning costs is made in the agreement, the arbitrators have no authority, by the common law, or by the revised statutes, to award costs of arbitration. *Vose* v. *Hoss*, 243.

ASSIGNMENT.

See MANUFACTURING CORPORATION, 5.

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1 C. and H. settled an account, in which C. had charged H. with large sums, and had also credited him with large payments in cash, leaving a balance against H., and proposed to advance to H. a further sum, and take H.'s note on time, secured by a mortgage, for a certain amount, which included such balance and such further sum, and agreed with H., that if there were overcharges against him, in said settled account, they should be corrected: H. gave his note and mortgage accordingly, and the sum thus advanced by C. was added to the account, and the note was credited, and the account closed. *Held*, that upon proof of overcharges against H., in the settled account, he might maintain an action against C. for money had and received, and recover the amount of such overcharges. *Harrington* v. *Curtis*, 469.

2 A. mortgaged real estate to B., and subsequently leased it, by indenture, to C., for five years, reserving rent payable yearly, and then assigned his interest in the lease to K.: Between five and six months after the date of the lease, B. entered upon the premises for condition broken, to foreclose the mortgage, and C. attorned to him, and afterwards accounted with him for the first year's rent reserved in the lease: K. brought an action against C., on a *quantum meruit* count, to recover a portion of the first year's rent. *Held*, that the action could not be maintained. *Knowles* v. *Maynard*, 352

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3. Where different persons claim the dividends on bank stock, the ownership of which is in dispute, and the directors of the bank promise one of the persons to pay him interest on the dividends, upon their being left in the bank, and he afterwards brings an action against the bank for the dividends, and fails to recover them, because the stock was proved to be the property of another person, he cannot recover the interest that was promised to him; such promise being without consideration. *Tobey* v. *Wareham Bank*, 440.

4. When a party makes a special agreement to do certain work within a fixed time, and fails to do it in the manner and within the time agreed, yet if he acts in good faith, and the other party receives a benefit from the work which is done, the law implies a promise by him to pay such sum therefor as the benefit which he receives is reasonably worth to him, and he is liable for such sum, in an action of indebitatus assumpsit. *Snow* v *Inhabitants of Ware*, 42.

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ATTACHMENT.

See INSOLVENT DEBTORS, 3. MORTGAGE, 2-4.

ATTORNEY.

1. When a sworn attorney of the court enters his appearance for a party, the party is bound by any admissions made by him, in writing, though out of court, concerning the facts in the cause, until the appearance is withdrawn, or the party revokes the attorney's authority, and gives notice of the revocation: Until the appearance is withdrawn, or the authority revoked and the revocation notified, the party cannot give evidence, on the trial of the cause, that the attorney had no authority in fact. *Lewis* v. *Sumner*, 269.

2. An attorney has no authority, by virtue merely of his retainer to prosecute or defend a suit, to release a claim of his client on a third person, for the purpose of making such person a competent witness for his client. *Shores* v. *Caswell*, 413.

ATTORNMENT.

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AUCTION AND AUCTIONEER.

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BASTARDY PROCESS.

1. Under St. 1839, c. 117, which established separate terms of the court of common pleas, in the county of Middlesex, for the transaction of civil and criminal business, a complaint, under Rev. Sts. c. 49, by the mother of a

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bastard child, against the alleged father, must be entered and proceeded with at a term held for the transaction of criminal business. *Cummings* v. *Hodgdon*, 246.

2. By the Rev. Sts. c. 49, § 1, an infant, who is accused of being the father of a bastard child, on a complaint made to a justice of the peace by the mother, may be required to give bond, with sureties, to appear and answer to such complaint, at the next court of common pleas, and to abide the order of the court thereon; and his infancy is no defence, either for him or his sureties, to an action on such bond. *McCall* v. *Parker*, 372.

3. In a suit on such bond, given by an infant, neither the principal nor the sureties can defend on either of the following grounds; viz. because it does not appear, from the record of the justice who issued the warrant against the party accused, and before whom the party accused was brought on the warrant, that the mother made complaint to the justice, previously to her examination by him; or because the mother, being an infant, made her complaint personally, and not by her next friend or guardian; or because such warrant directed the officer to bring the party accused before the justice who issued it, or before some other justice; or because the warrant directed the officer to bring the party accused before the justice, to find sureties for his personal appearance at the next term of the court of common pleas; or because the order of the justice was, that the party accused should give bond for his personal appearance at court, and to abide and perform the order or orders of the court; or because the accused party's appearance at court was by attorney. *Ib.*

BILL OF LADING.

A bill of lading, signed "A. B. for the master," is admissible in evidence, if A. B. had authority so to sign, although his authority does not appear on the bill; and his testimony, if believed, is sufficient proof of such authority. *Putnam* v. *Tillotson*, 517.

BURDEN OF PROOF.

See Evidence, 3.

BY-LAW.

See Corporation. Evidence, 15. Rail Road Corporation, 12.

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See Maintenance, &c.

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See Taxes.

CONDITION.

See Deed, 7.

CONSIDERATION.

See Assumpsit, 3. Maintenance. Promissory Note, 2. 3.

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CONSTABLE.

A constable has no authority, by Rev. Sts. c. 15, to serve a writ of replevin, except in a case where the sheriff or his deputy is a party to a suit in which the value of the property to be replevied does not exceed the sum of seventy dollars. *Conner* v. *Palmer*, 302.

See TAXES, 7.

CORPORATION.

When neither the charter of a corporation, nor any general statute, imposes on the individual members a liability to pay its debts, such liability cannot be imposed by a by-law of the corporation. *Trustees of Free Schools in Andover* v. *Flint*, 539.

See EVIDENCE, 15.

COSTS.

1. When a jury disagree as to one count in a declaration, and find for the plaintiff on the other count, and he thereupon strikes out the count on which they disagree, the defendant is not entitled, under Rev. Sts. c. 121, § 16, to the costs of the trial on that count. *Soule* v. *Russell*, 436.
2. In an action of trespass on real estate, brought originally in the court of common pleas, the plaintiff is entitled, under Rev. Sts. c. 121, §§ 3, 13, to full costs, if he prevails, though he does not recover damages exceeding twenty dollars. *Sawyer* v. *Ryan*, 144.

See ARBITRAMENT, &c. 2.

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See RAIL ROAD CORPORATION, 3-8. TROVER, 1.

DEED.

1. If a disseizee, who has a right of entry, peaceably enters upon the land, and there delivers a deed thereof, the deed will pass his title, though the grantee knows that the title is in controversy. *Warner* v. *Bull*, 1.
2. The provision in Rev. Sts. c. 59, § 28, that no conveyance of an estate in fee or for life, nor any lease for more than seven years, "shall be valid and effectual against any other person than the grantor, his heirs, &c. unless it be made by deed recorded," does not dispense with the necessity of a deed, in order to pass an estate for life, even as against the grantor and his heirs. *Stewart* v. *Clark*, 79.
3. By a grant of a mill, the land under the mill, and land adjacent thereto, so far as necessary to its use, and commonly used with it, and no further, will pass by implication: So of an exception of a mill from a grant of land. *Forbush* v. *Lombard*, 109.
4. A. granted to B., by deed, a tract of land, bounded on all sides by the lands of persons named, excepting therefrom "the mills and water privileges" then owned by A.: At the time of this grant, about an acre of land lay common and unfenced, as a mill yard, and was used for putting

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timber thereon, and for passing and repassing to and from the mills, but part of that acre was afterwards used, by the owners of the mills, for a garden, and for the site of buildings not connected with the mills. *Held*, that the land which had been thus used for such buildings and for a garden was not within the exception in A.'s deed. *Ib.*

5. A., the owner of land, with a mill privilege, grist mill and dam thereon, made an oral agreement, with B. and C., to build a saw mill on said land and dam, one half by A. and the other half by B. and C., and to use the same jointly, until it should run down; and the saw mill was built and used, according to said agreement, for several years, when A. conveyed to D his land, grist mill and dam, "and also one half the saw mill, with all the appurtenances and privileges to the said half saw mill belonging; the said saw mill being in common and undivided with B. and C., owners of the other half, who have the privilege of using the same, in equal shares with the said D., until it shall run down;" and D. conveyed to E. the said land, with all his right, title and interest in and to the grist mill and saw mill standing thereon, "being the same premises conveyed by A. to said D.:" A., after the death of B. and C., conveyed to their heirs "one half of a saw mill, being in common and undivided with D., and being the same that said A. reserved to B. and C. in his deed to D.:" E. refused to permit said heirs to use the saw mill, and they brought a real action to recover possession of a moiety thereof. *Held*, that the deed from A. to D. reserved to B. and C. only a life estate in the land on which the saw mill stood, and that the action could not be maintained. *Curtis* v. *Gardner*, 457.

6 A. granted to B., by deed, a narrow strip of land "for the purpose of enabling the grantee to erect a mill dam:" By the same deed, A. granted to B. "the right to build, upon the land of the grantor, a mill or factory, somewhere near the northwest corner of S. W.'s land; and also the right to dig a canal or trench from said mill dam to such mill as may be erected; with the right of passing to and from said mill dam and mill, over the grantor's land:" B. built a mill dam on said narrow strip of land, and also a mill near the northwest corner of S. W.'s land, but not on the land of A., and dug a canal from said dam, partly through the land of A., to said mill, and, six years afterwards, entered upon A.'s land, through which the canal was dug, to repair and clear out the canal. *Held*, that said deed gave B. no right to dig a canal through A.'s land in any other place than that designated, namely, from said mill dam to a mill on A.'s land; and that A. might maintain an action of trespass against B. for entering on A.'s land to repair and clear out the canal, even though A. had acquiesced, for six years, in the building of the mill and the digging of the canal. *Dickerson* v. *Mixter*, 217.

7. The proprietors of Canal Bridge granted to B. and others, by deed, a lot of land, in fee, to be held in trust for S. and others, and their associates, "for the purpose of the public worship of God, and the erection, on said premises granted, of a church or meeting-house for said worship, as also a house for a clergyman, and a school house." The following conditions were inserted in the deed: "And this grant hereby made is upon the

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express condition that the grantees, or *cestuis que trust*, or some of them, shall build and finish, within two years from the ninth day of November 1822, on the lot hereby conveyed, a church or meeting-house for the public worship of God, and shall build and finish, within three years from the said ninth day of November, a suitable dwelling-house for the clergyman, and a school house, all on the lot hereby conveyed; and in case the said church or meeting-house, and parsonage house and school house, shall not be built on said lot, and finished within the respective times above mentioned, then the land hereby granted, with its appurtenances, is to revert to said Proprietors of Canal Bridge: And this grant is upon this further condition, that the land hereby conveyed shall be forever hereafter appropriated to the maintenance and support of the public worship of God, as hereinbefore specified, and to no other uses or purposes whatever; otherwise, the same to revert to said corporation of the Canal Bridge, as above mentioned:" Afterwards, the grantors extended the time within which the school house might be built: B. and others conveyed said lot to S and others, in trust for a religious society that had been incorporated, to be held on the same trusts and conditions that were expressed in the deed of the original grantors, made to B. and others: The meeting-house, parsonage house and school house were built on said lot, and were finished, to the satisfaction of the original grantors, within the times mentioned in their deed, and afterwards extended by them: Afterwards, another house, connected with the school house, was built on said lot, for the use of the preceptor of the school; a vestry and two shops were made in the basement of the meeting-house, and the shops leased for secular business; the land on which the parsonage house was built was mortgaged for a debt incurred in building on the whole lot; the land on which the school house and preceptor's house were built was leased for a long term to an incorporated academy, and said academy mortgaged the same: The original grantors entered upon the land originally granted by them to B. and others, for breaches of the conditions in their deed of conveyance, and brought writs of entry to recover the whole land as forfeited by such breaches. *Held*, that the second condition in said original deed was repugnant to the previous parts of the deed, and was void; and that the actions could not be maintained. *Proprietors of Canal Bridge* v. *Methodist Religious Society and Wesleyan Academy*, 335.

3. County commissioners laid an aqueduct from a spring, through the lands of several persons, to the county buildings, and thereby diverted the water which before flowed to the works of S.: At or about the time when the aqueduct was laid, a lateral pipe was inserted in it, and water thereby conveyed to said works; but it did not appear by whose order or at whose expense the pipe was thus inserted: The commissioners afterwards caused the pipe to be cut off, and S. was thereby deprived of the use of the water: S brought an action against the commissioners, alleging, in one count, that they had diverted the water of the spring, and in another count, that they caused the pipe to be cut off: The commissioners, in their defence, gave in evidence a deed, executed after the aqueduct was laid, by S. and

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others, through whose land it was laid, in which deed they recited that it had been laid with their consent, and acknowledged that they had received full satisfaction for all damages occasioned to their several lands by laying it, and in which they also granted to the county the liberty of entering upon their several lands, for the purpose of repairing, or relaying, or taking up said aqueduct, whenever the county commissioners, or any authorized agents of the county, might deem it necessary; the county to pay to the owners of said lands such damages as should be thereafter occasioned by entering thereon for said purpose. *Held*, that this deed was a grant to the county of the entire use of the water of the spring; that the whole damages for such use had been received by S.; that if the pipe was inserted in the aqueduct before the deed was executed, the right to continue it was relinquished by the deed; that if the pipe was inserted after the deed was executed, it was either a trespass, or was done in pursuance of a parol license of the commissioners, which was revocable and had been revoked; and that in either case, the commissioners had a right to cut off the pipe. *Stanwood* v. *Kimball*, 526.

9 R. conveyed to M. all the estates conveyed to R. by P., "excepting the chamber and bed room heretofore conveyed by said R. to A. L. B.; excepting and reserving also to B. B. that she may continue to live in the dwelling-house herein conveyed, during her life, without paying any rent therefor:" M. conveyed all the estates conveyed to M. by R., "excepting the chamber and bed room owned by A. L. B., and excepting also the reservation to B. B. that she may continue to live in the dwelling-house belonging to the premises hereby conveyed, during her life, without paying any rent therefor:" B. B. afterwards brought an action of trespass against F. for breaking and entering her dwelling-house and disturbing her possession thereof. *Held*, that though B. B. could not show title in the house by a reservation in a deed between other parties, yet that the reservation to her, in M.'s deed to F., prevented the reserved part of the estate from passing to F., and that if M. did not interfere to prevent B. B.'s possession, but permitted her to occupy the house, her possession was lawful and valid against all other persons, and that she might maintain trespass, if her possession was violated. *Held also*, that though the description, in the deeds, of that part of the house which was reserved, was uncertain, yet if B. B., at the time when M. conveyed to F., was in possession of that part of the house, upon which the trespass was alleged to have been committed by F., M. was disseized *pro tanto*, and that part did not pass to F.; and that parol evidence was admissible to prove that B. B. had possession of that part, at that time. *Bessom* v. *Freto*, 523.

DEVISE.

See WILL.

DOWER.

A judge of probate has no authority, under the Rev. Sts. c. 60, § 3, to assign

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dower to a widow in lands mortgaged by her husband. *Inhabitants of Raynham* v. *Wilmarth*, 414.

See MORTGAGE, 10. 12.

DRAIN.

See EASEMENT, 2. 3. MILL, &c.

EASEMENT.

1. A declaration sufficiently shows, after verdict, that the action respects an easement on real estate within the St. of 1840, c. 87, § 1, by alleging that the plaintiff was seized and possessed of a mill, mill dam and water privilege on F. Brook, and had a right to the use of the water in said brook for the raising of a head of water, and for the driving of his said mill, without molestation, and that the defendant erected, over and across said brook and another brook leading into the same above the plaintiff's mill, a dam, in such an insecure, unskilful, loose and unworkmanlike manner, that after raising a great body of water in said stream, above the plaintiff's mill, the defendant's dam was carried away by reason of this improper and insecure construction, by means whereof a large and unusual quantity of water was let down upon the plaintiff's dam and mill, whereby the same were greatly damaged, and a large quantity of sand was washed and thrown into the pond of the plaintiff, by which the same was much diminished in capacity for containing water, and his mill privilege thereby greatly reduced in value, and he was put to the expense of $200 for the repairs of the same, and was subjected to great loss by the interruption of the business of his mill. *Soule* v. *Russell*, 436.

2. A right to empty a town drain upon the land of an individual cannot be acquired by twenty years' use, unless the drain be one and the same, and the use thereof uninterrupted during that number of years: If the drain, during those years, be enlarged, deepened, and varied in its course and termination, the town cannot acquire such right, as against the owner of the land, by using the drain less than twenty years after it is thus enlarged and altered. *Cotton* v. *Pocasset Manufacturing Co.* 429.

3. So a person who enters a drain from his cellar into a town drain which is afterwards enlarged, deepened, and varied in its course and termination, and who subsequently deepens his cellar, and lays the drain therefrom deeper than it was before, and enters it into the altered town drain, cannot acquire a right thus to drain his cellar, by a use of the town drain for less than twenty years after it is altered. *Ib.*

EQUITY.

1. The owners of several estates, being jointly interested in the water power connected therewith, formed a company, and entered into an agreement, by indenture, in which each covenanted, for himself and his personal representatives or assigns, with the others and their respective personal representatives or assigns, and his and their respective estates, for the faithful performance of the conditions and provisions of said indenture

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"meaning and intending to create a lien upon and to bind" their "said estates, so far as" they might, "in law or equity, do the same, and" their "several heirs, executors, administrators, or assigns, so far as said estates," &c. were "concerned, and to the extent thereof, and no further, as fully and absolutely, and as far as" they might "do the same, either in law or equity, for the faithful discharge and fulfilment of all the liabilities of said company, and of the requirements and provisions of said indenture:" C., one of the parties to said indenture, having afterwards incurred expense, pursuant to the provisions of the indenture, for the purpose of increasing the water power, in which all the parties to the indenture were jointly interested, brought a bill in equity against third persons, to whom some of said parties had conveyed their said estates, praying that they might be held to pay him their shares and proportions of said expense, and also praying for general relief. *Held*, that the indenture could not be so construed as to operate as a legal mortgage; that it could be regarded only as an equitable mortgage; that if it created any lien, implying a trust, it was a trust *sui generis*, in the nature of an equitable mortgage, of which the court has no jurisdiction; and that the bill must be dismissed. *Clarke* v. *Sibley*, 210.

2. H. made a written agreement with B. to convey certain real estate to B. within twenty days, and, before the expiration of twenty days, conveyed the estate to A.: B. brought a bill in equity against H. and A. for a specific performance of H.'s agreement, and alleged in the bill, that H. and A. unlawfully combined to defraud him, and that H. fraudulently conveyed the estate to A., without consideration, and that A., before H.'s conveyance to him, had been informed, or had reason to believe, that H. had before contracted to convey the estate to B.: A., in his answer, denied that the estate was conveyed to him without consideration, or that there was any unlawful combination between him and H.; but he admitted that, before H. conveyed the estate to him, he had been informed, and that he believed, that H. had made some bargain with B. respecting said estate; but that he had been informed that the bargain had ceased to be binding, and that H., when he conveyed the estate to him, informed him that he (H.) had good right to sell the same to him, and that he had no reason to believe, and did not believe or suspect, that H. was under any obligation, at the time when he conveyed the estate to him, (A.) to convey it to B. *Held*, that this answer put B. to the proof of the facts alleged in the bill; and that upon the answer, it did not appear that A. had such notice of H.'s agreement with B., as would entitle B. to a decree against A. for a conveyance of the estate to B. *Buttrick* v. *Holden*, 355.

See ARBITRAMENT, &c. 1. MORTGAGE, 9. WILL, 4.

EVIDENCE.

1. On the trial of an indictment, which alleged that the defendant erected and maintained a building for the purpose of manufacturing neat's-foot oil therein, and boiled and tried putrid meats, &c. therein, by means whereof noisome and offensive smells issued from the building, to the common

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nuisance of the citizens, it appeared in evidence that noisome and offensive smells issued from other parts of the defendant's premises, near the said building, by reason of the use made, near thereto, but not therein, of the materials boiled and tried in the building. *Held*, that the jury, in deciding whether the defendant was guilty of the offence charged in the indictment, could not take into account any offensive smells that did not issue from the building. *Commonwealth* v. *Brown*, 365.

2. In an action to recover for labor, the plaintiff's memorandum book, containing his charges against the defendant, all entered on one leaf, with no intervening charges, and though written with a pencil, is admissible in evidence, on his suppletory oath. *Gibson* v. *Bailey*, 537.

3. In an action of trespass *quare clausum fregit*, the plaintiff, to prove his title to the close described in his declaration, offered in evidence an office copy of the levy of an execution thereon: The defendant thereupon produced the original levy, as returned on the execution, in which were material alterations and interlineations, affecting the boundaries of the land set off, and objected to the admission of the copy in evidence, until the plaintiff should explain and account for said alterations. *Held*, that the copy was admissible, and that the burden of explaining and accounting for the alterations was not on the plaintiff. *Wilbur* v. *Wilbur*, 405.

4. On the trial of a real action, after the demandant had given evidence tending to show that the tenant's deed of the demanded premises was not given to him on any pecuniary consideration, the tenant offered in evidence his attested note, given to his grantor a few weeks after the execution of the deed, and the testimony of the attesting witness, that when the note was given, he understood, from the conversation between the grantor and the tenant, that it was given on account of a mortgage on the demanded premises, and to pay the grantor's debts, and that, when the note should be paid, the tenant was to have the demanded premises. *Held*, that this evidence was admissible, as part of the *res gesta*. *Blood* v. *Rideout*, 237.

5. A. conveyed land to B., reserving to himself a life estate therein: B.'s reversion was sold after his decease, and A. afterwards became the grantee thereof: A. then conveyed a part of said land, together with other land, to R. in fee, for the alleged consideration of $2000, and R. at the same time gave back a lease to A. of all the land so conveyed, for A.'s life: In a real action, brought by B.'s heirs, to recover of R. the land that once was B.'s, one question was, whether R. paid any pecuniary consideratior therefor: R. gave in evidence a note given by him to A. for $700, and also introduced evidence tending to show that the note was given in payment for the land conveyed to him by A. *Held*, that B.'s heirs could not give evidence of the value of the land, at the time when A. conveyed it to R., for the purpose of warranting the jury to infer that said note was given for A.'s life estate, and not for the whole fee simple. *Ib.*

6. The *Sts.* of 1840, c. 84, and 1841, c. 20, which provide, that "where the fact of marriage is required or offered to be proved, evidence of general repute, cohabitation as married persons, or any other circumstantial or presumptive evidence, from which the fact may be inferred, shal be

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competent evidence for consideration," do not require that the evidence shou.d come from the members or connexions of the family of the parties whose marriage is in question: It may come from any person who knows the circumstances. *Knower* v. *Wesson*, 143.

On the trial of an action to recover damages for injury done to the plaintiff's garden and nursery, by the smoke, heat and gas, proceeding from the defendant's brick kiln, after two gardeners, who had much experience in raising and cultivating fruit trees, shrubs and plants, had testified to the particulars of the plaintiff's injury, they were asked by the plaintiff, "what was the amount of damage" caused by the injury to which they had before testified. *Held*, that these witnesses might give their opinion as to the amount of such damage. *Vandine* v. *Burpee*, 288.

8. County commissioners ordered a road to be altered and repaired by a town, in a certain manner and within a certain time: The town chose a committee to superintend the alterations and repairs, and to contract for payment therefor: The committee put up the work, at auction, to the lowest bidder, and A. became such bidder, and did work on the road, for which he sued the town, in an action of indebitatus assumpsit: The town gave evidence, in defence, that the committee, when they put up the work at auction, announced that the road was to be made more thoroughly and safely, in certain particulars, than was required by the order of the commissioners, and that A. had not so made the road. *Held*, that A., for the purpose of showing that he performed his work on the road in good faith, might give evidence that he did not hear the announcement of the committee, at the auction, but believed that he undertook to do the work on the road in the manner prescribed by the order of the commissioners. *Snow* v. *Inhabitants of Ware*, 42.

9. In an action against a town to recover pay for repairing a road which the county commissioners had ordered to be raised four feet in a certain hollow, the plaintiff may, for the purpose of proving that he had raised the road four feet, as ordered, and in good faith supposed that he had so raised it, give evidence that the commissioners, before they made the order, placed a stake in the ground, and stated that they should require the road to be raised as high as the top of the stake, and that the plaintiff had raised the road to that height. *Ib.*

10. And in such action against a town, though the plaintiff did not finish his work within the time agreed on between him and the committee of the town, with whom he made the agreement, yet if the committee and other principal inhabitants of the town knew that he continued his work after the agreed time for finishing it had expired, and made no objection to his proceeding, the jury may infer that the town had waived the agreement as to time. *Ib.*

11. H. signed a memorandum, as follows: "I have sold to R. four building lots; first two lots ninety feet front, depth about one hundred and fourteen and ninety six and a half; next two lots one hundred feet front, depth about ninety two and seventy six feet; all the above lots the same as laid down on the plan: First two mentioned lots at five cents a foot; ne xt two

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lots at four and a quarter cents a foot:" R. brought an action against H., alleging in his declaration that he had tendered to H. twenty five per cent. of the price of said lots, and demanded a deed thereof; that he was ready to execute mortgages to H., to secure the other seventy five per cent. of said price, and that H. had refused to execute a deed: At the trial, R. offered parol evidence to prove that when said memorandum was executed, it was agreed between him and H. that one quarter part of the purchase money should be paid in cash, on the delivery of the deed, and that the other three quarters should be secured by notes and mortgages, and that the notes should be payable in one, two and three years, with interest yearly. *Held*, that this evidence was inadmissible, both because it would vary the written agreement, the legal effect of which was to pay cash on demand, within a reasonable time, and because it was offered in proof of the terms of a contract for the sale of land, contrary to the statute of frauds. *Ryan* v. *Hall*, 520.

12. On the trial of an action brought by one town against another, to recover expenses incurred for the support of a pauper who was alleged to have acquired a settlement in the defendant town by residing there ten years together, and paying taxes for five of those years, it appeared that the pauper had removed to a third town, during the ten years, and remained there a short time, and then returned to the defendant town. *Held*, that the pauper's statements, made immediately after his return, as to his intention, when he removed, could not be received in evidence: *Aliter* as to his statements, made after he formed the intention of removing, and at or about the time of his removal. *Inhabitants of Salem* v. *Inhabitants of Lynn*, 544.

13. By virtue of St. 1836, c. 273, which prohibits special pleas in bar, and allows all matters of defence to be given in evidence under the general issue, a defendant may give in evidence any matter set forth in his original specification of defence, although he files and also relies on another specification *puis darrein continuance*; such second specification not being a waiver of the first: The effect of that statute is, to give a defendant the right to prove all matters existing at the time of the trial, which may be effectual in law to bar the plaintiff's action. *Shirley* v. *Shattuck*, 256.

14. When a defendant withdraws his specification of defence, and goes to trial on the general issue alone, neither the fact of his having filed and withdrawn the specification, nor the averments contained in it, can be given in evidence, or taken into consideration by the jury, for any purpose. *Baldwin* v. *Gregg*, 253.

15. In an action of assumpsit against a member of a corporation, brought by one of its creditors to recover money lent to it, evidence is not admissible to prove that the defendant informed other creditors, when they lent money to the corporation, that its members were individually liable for its debts, and showed them a by-law of the corporation imposing such liability. *Trustees of Free Schools in Andover* v. *Flint*, 539.

See Attorney, 1. Bill of Lading. Rail Road Corporation, 9 Slander, 2. Taxes, 4. Usage. Witness.

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EXCEPTION.

See DEED, 3. 4. 9.

EXECUTOR AND ADMINISTRATOR.

1 C., by his last will, gave to his wife the interest and income of $1000 and to his daughter the use and income of $1000, during her life: After making other devises and bequests, he devised and bequeathed the residue of his property, real and personal, to his daughter and her children, and to his grandson, in equal shares, subject to the rights and directions afterwards given, by the will, to the executor therein named, and subject to the payment of his (C.'s) debts: He then appointed T. his sole executor, and authorized him to sell and convey such of his (C.'s) property, as in T.'s judgment would best promote the interest of all concerned, to raise the $2000 for the use of C.'s wife and daughter, and to pay his debts: T. declined to act as executor, and D. was appointed administrator of C.'s estate, with the will annexed: C.'s widow waived the provision made for her by the will, and dower was assigned to her: D., under his appointment as administrator, and by no other authority, sold and conveyed C.'s real estate, for the purpose of raising money to pay C.'s debts and the legacies given by his will. *Held*, that D. had no authority to sell the testator's real estate, and that the sale and conveyance thereof by him were void, as against the testator's heirs. *Tainter* v. *Clark*, 220.

2. The St. of 1783, c. 36, § 17, which prescribed the form of the oath to be taken by an administrator, executor or guardian, who had obtained a legal order or license to sell real estate, did not, like St. 1817, c. 190, § 11, require that the oath should be taken before fixing on the time of sale. *Blood* v. *Hayman*, 231.

3. Though an administrator, who obtains license to sell his intestate's real estate, cannot lawfully be himself the purchaser, either directly or indirectly, and though, if he so becomes the purchaser, the heirs of the intestate may avoid the sale, yet the estate, so sold and purchased, passes to the grantee, by the administrator's conveyance thereof, subject to be defeated by the heirs; and if it is afterwards sold and conveyed, for a valuable and full consideration, to a *bona fide* purchaser, who had no notice that it had been bought, at the administrator's sale, for the administrator's benefit, such purchaser will hold it against the heirs of the intestate. *Ib.*

4. By the Rev. Sts. c. 65, §§ 11, 14, the sale, by an administrator, of real estate mortgaged to his intestate, and of the debt secured by the mortgage, is required to be by license of the probate court, obtained in the manner required, by Rev. Sts. c. 71, although neither the intestate nor the administrator has taken possession of the estate. *Ex parte Blair*, 126.

5. When the same person is executor of a will and guardian of a minor to whom a legacy is given by the will, he holds the amount of the legacy in his capacity of executor, and not as guardian, until he settles an account of his administration, in the probate court, crediting himself, as executor, with the legacy, and charging himself therewith, as guardian: Until such account is allowed by a decree of the probate court, an action cannot

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be maintained against him and his sureties on his guardianship bond, for neglect to pay the legacy; but an action may be maintained against him and his sureties on the bond given by him as executor. *Conkey* v. *Dickinson*, 51.

FRAUDS, STATUTE OF.

1. H., a broker, whose business was to buy and sell fish, as well for himself as for others, was authorized by S. & Co. to buy fish for them, and bargained with F. for a quantity of fish, intending to buy for S. & Co., but not intimating to F. that he was not buying for himself, and made this written memorandum of the bargain: "October 21st 1846. F. agrees to sell H. his fare of fish, at $2·50 per quintal, as they lay, or to go on flakes one good day, at $2·62½; and to have the refusal of them until Friday evening, 23d instant:" H. gave notice to F., before Friday evening, that he would take the fish at $2·62½, they to be put on flakes one good day: F. refused to deliver the fish to H., and S. & Co. brought an action against F. for breach of the bargain. *Held*, that the case was within the statute of frauds, and that the action could not be maintained. *Shaw* v. *Finney*, 453.
2. A sale at auction is within the statute of frauds, and the auctioneer is the agent of the buyer and the seller, and his memorandum takes a case out of the statute, as well where lands as where chattels are sold: But his memorandum must refer to the conditions of sale, and must state the material terms of the agreement, or the case will be within the statute. *Morton* v. *Dean*, 385.
3. An auctioneer, on selling real estate to S. D. at auction, after reading or exhibiting written conditions of sale, made this memorandum in writing: "Sale, on account of Messrs. Morton and Dean, assignees of the Taunton Iron Company, of the real estate, nail works, water privilege, buildings and machinery, agreeable to the plans and schedule herewith. Sale to Silas Dean for $30,300. April 5th 1843." *Held*, that as this memorandum did not contain nor refer to the conditions of sale, it did not take the case out of the statute of frauds. *Ib.*
4. An oral promise of a member of a corporation to pay its debts will not bind him; such promise being within the statute of frauds. *Trustees of Free Schools in Andover* v. *Flint*, 539.

See EVIDENCE, 11

FRAUDULENT CONVEYANCE.

See PARTNERSHIP.

GOODS SOLD AND DELIVERED

See USAGE.

GUARANTY.

See PROMISSORY NOTE, 2.

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GUARDIAN.
See Executor, &c. 5.

HIGHWAY.
See Way.

HUSBAND AND WIFE.
See Mechanics' Lien. Tenant in Common.

IMPROVEMENTS.
See Partition, 2.

IMPOUNDING CATTLE.

B. took up beasts doing damage on his land, and impounded them in his own enclosure for several hours, and then drove them towards the town pound, and delivered them, in the highway near the pound, to the pound keeper, (who was also a field driver,) as cattle taken doing damage, but did not leave with the pound keeper a written memorandum, as required by the Rev. Sts. c. 113, § 6, stating the cause of impounding and the sum that he demanded for the damage done: The pound keeper put the beasts into the pound, and gave the owner the notice required to be given by field drivers when they impound beasts taken up for going at large contrary to law. *Held*, that B. became a trespasser *ab initio*, by failing to leave with the pound keeper the written memorandum required by law, and was answerable to the owner of the beasts in an action of trespass for taking, driving away and detaining them. *Sherman* v. *Braman*, 407.

INFANT.

1. An infant cannot be held to pay for grain furnished for horses owned by a firm of which he was a member, though the horses were employed in the usual business of the firm, and though he was emancipated by his father. *Mason* v. *Wright*, 306.

2. An infant bought goods, that were not necessaries, and the sellers, three days before he came of age, brought an action against him for the price, and attached the goods on their writ: The goods remained in the hands of the attaching officer, at the time of the trial of the action, and the defendant gave no notice to the plaintiffs, after he came of age, of his intention not to be bound by the contract of sale. *Held*, that there was not a ratification of the contract of sale, by the defendant, and that the action could not be maintained. *Smith* v. *Kelley*, 309.

See Bastardy Process, 2. 3.

INSOLVENT DEBTORS.

1. A creditor who proves his claim against his debtor, under proceedings in insolvency, and also the costs which had accrued in a suit commenced on the claim before proceedings in insolvency were instituted, and receives a

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dividend on the claim, and also such costs in full, is not thereby estopped to contest his debtor's discharge under the insolvent laws, by showing that it is void on any of the grounds upon which those laws provide that it shall be of no effect. *Morse* v. *Reed*, 62.

2. The provision in St. 1841, c. 124, § 3, that the assignee of an insolvent debtor, in certain cases, may recover, from a creditor of such debtor, the property, or the full value of any property, assigned, sold, transferred or conveyed to the creditor by such debtor, with intent to give a preference to the creditor, does not extend to money paid by such debtor, though paid with intent to prefer the creditor: Money paid by such debtor, with such intent, cannot be recovered back by his assignee, by virtue of said statute, although the creditor, when he received the money, also purchased goods of such debtor, knowing him to be insolvent. *Wall* v. *Lakin & Choate*, 167.

3. Though the first publication of notice, by a messenger, that a warrant under the insolvent law has issued against a debtor whose goods are attached on mesne process, be not made till after judgment is rendered against the debtor, yet if it be made before the goods are taken in execution, the attachment is dissolved, and the bailee, to whom the attaching officer had delivered the goods, upon a promise to return them to him, is discharged from the obligation of his promise. *Andrews* v. *Southwick*, 535

INSOLVENT ESTATES.

See Lien. Mortgage, 7. 8.

INSURANCE.

See Rail Road Corporation, 2.

INTEREST.

A. indorsed several notes to B., which were payable in two, three, and more years from date, with interest, and gave B. a written promise to pay him annual interest on the notes, if the makers should not pay it: As the notes became payable, B. received payment from the makers, who refused to pay annual interest thereon: After all the notes were paid, B. brought an action against A. to recover the difference between the amount of annual interest and the interest which had been paid to him. *Held*, that the action could not be maintained. *Henry* v. *Flagg*, 64.

See Assumpsit, 3.

JUDGMENT.

The provisions in Rev. Sts. c. 92, §§ 12, 13, that when service is made on part only of the defendants who are jointly sued on a contract, the suit may proceed against those on whom service is made, and that the judgment recovered in such suit, while it remains unsatisfied, shall not be a bar to a subsequent suit brought against the other joint contractors, apply

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as well to a judgment recovered in another State, as to a judgment recovered in this Commonwealth. *Shirley* v. *Shattuck*, 256.

See LIMITATIONS, 2.

JUROR.

A person called as a juror, on the trial of an indictment, who, upon examination on oath, according to the provision of the Rev. Sts. c. 95, § 27, answers that he has formed and expressed an opinion that the statute, on which the defendant is indicted, is in force, and was constitutionally enacted, is not thereby shown not to stand indifferent in the cause: And after he has made such answer, the court will not allow him to be asked whether he can give due weight to, and be fairly influenced by, the arguments of the defendant's counsel against the opinion so formed and expressed. *Commonwealth* v. *Abbott*, 120.

JURY.

See RAIL ROAD CORPORATION, 3–8.

LANDLORD AND TENANT.

1. If a lessee, to prevent being actually expelled from the demised premises, yields the possession thereof, and attorns, in good faith, to one who has a title paramount to that of the lessee and his lessor, and also a right to immediate possession, this is equivalent to an actual ouster, and is a good defence to an action, brought by the lessor against the lessee, for rent. *Morse* v. *Goddard*, 177.

2. A landlord gave a tenant of a store three months' notice to quit, and at the end of three months, upon the tenant's saying that it would be a great accommodation to him to remain in the store a while longer, so that he might sell off his old goods, without removing them, the landlord told him he might remain in the store a while longer: After the tenant had remained in the store sixteen days, the landlord brought an action against him, on the Rev. Sts. c. 104, to obtain possession. *Held*, that if the parties agreed that the tenant should occupy the store for a short though indefinite period, after the time limited in the notice, with a view to the convenience of the tenant, such agreement was not a waiver of the notice and a renewal of the tenancy, and that the landlord might maintain the action, without giving the tenant any further notice to quit. *Babcock* v *Albee*, 273.

3. A landlord, to whom rent was payable monthly, gave notice to the tenant, on the 1st of November, to quit "for the non-payment of rent:" On the same day, the tenant tendered to the landlord the amount of several months' rent; but it did not appear whether the tender was before or after the service of the notice: When the tender was made, the landlord said he did not wish to take the money, as repairs had been made by the tenant, and he did not know what balance was due; and he told the tenant that he need not quit the premises, and that when he (the landlord) should come again, he would see what the balance was, and would settle: After the

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tenant had continued in possession six or seven weeks, the landlord brought an action against him on the Rev. Sts. c. 104. *Held*, that the landlord, under the notice given by him, could recover only on the ground of non-payment of rent; that if the tender was before notice given, and the landlord declined to receive the money, for the reason given by him, then the rent was not in arrear, within the meaning of the law, and the landlord could not recover on that ground; that if the tender was after notice given, and the landlord declined to receive the money, and told the tenant that he need not quit, this was a waiver of the notice and a renewal of the tenancy, and the landlord could not recover on that notice. *Tuttle* v *Ream*, 275.

See PROMISSORY NOTE, 4.

LIBEL.

The publication of a false and malicious libel has always, by the common law of Massachusetts, been an offence punishable by indictment. *Commonwealth* v. *Chapman*, 68.

LIEN.

A. ordered goods to be packed and forwarded to F. & Co., commission merchants, to whom he owed a balance, on account, and wrote a letter of advice, enclosing an invoice, but died before the letter was mailed or the goods had left his premises, and his son, on the day after his death, forwarded the letter and the goods, and F. & Co. sold them, and gave credit for the proceeds, in reduction of their balance against A., whose estate was insolvent. *Held*, that F. & Co. had no lien on these goods, for the balance of their account against A., and that they must pay over the said proceeds to A.'s administrator. *Farnum* v. *Boutelle*, 159.

See EQUITY, 1. MECHANICS' LIEN. MORTGAGE, 1. TROVER.

LIMITATIONS, STATUTE OF.

1. M. made a note payable to his own order, and at the same time indorsed it in blank, and delivered it to G. for G.'s own use: M.'s signature to the note, and his indorsement and delivery thereof to G., were in the presence of an attesting witness: G. afterwards transferred the note to H. by delivery, under the blank indorsement: More than six years after the note was payable, H. brought an action thereon against M. *Held*, that the action was barred by the statute of limitations, not being within the Rev. Sts. c. 120, § 4, which except from the statute bar "any action brought upon a promissory note which is signed in the presence of an attesting witness, provided the action be brought by the original payee, or by his executor or administrator." *Houghton* v. *Mann*, 128.

2. The police court of Lowell is a court of record, within the meaning of the Rev. Sts. c. 120, § 1, and actions on its judgments are not barred by the six years' limitation. *Bannegan* v. *Murphy*, 251.

LORD'S DAY.

See ACTION.

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MAINTENANCE AND CHAMPERTY.

A. had an interest in the exclusive use, in Manchester, (N. H.) of a certain patent machine, and B. had an interest in the exclusive use of the same machine in Lowell: S. was using said machine, in Manchester, without right: A. gave to B. a power of attorney, authorizing him to take such steps, in A.'s name, as B. might judge to be necessary or expedient, by suit at law or otherwise, to prevent S. from using, letting or selling said machine, in Manchester, and also authorizing B. to sell to S. the right to use said machine in Manchester: And by a parol agreement between A. and B., B. was to have, as his compensation for his services under said power of attorney, one half of what he should recover or receive of S.: B. rendered services, under said power, for which he was entitled, by said parol agreement, to twenty five dollars: A. afterwards assigned his right to the use of said machine to C., with notice of B.'s claim on A., and with authority to C. to revoke said power of attorney given to B., upon paying B. twenty five dollars: C. promised B. to pay him said sum, and B. consented to the revocation of the power of attorney: B. afterwards brought an action against C., to recover said sum of twenty five dollars. *Held*, that the parol agreement between A. and B. was not illegal and void on the ground of maintenance and champerty, but was a valid agreement; that C.'s promise to pay B. said sum was on a good and sufficient consideration; and that the action could be maintained. *Call* v. *Calef*, 362.

MANUFACTURING CORPORATION.

1. The directors of an insolvent manufacturing corporation have authority to convey all the property of the corporation to one of its creditors, upon condition that he shall apply the property to the payment of his claim, and pay over the surplus, if any, to the treasurer of the corporation: And such conveyance is not fraudulent, as against other creditors, by reason of its tendency to give a preference. *Sargent* v. *Webster*, 497.
2. Unless the by-laws of a manufacturing corporation, or a statute, expressly provide otherwise, the same person may be treasurer and director, and a majority of the directors constitute a quorum, and a majority of the quorum have authority to decide any question upon which they can act. *Ib.*
3. It is not necessary that the president of a manufacturing corporation should be present at a meeting of the directors, in order to authorize them to transact business. *Ib.*
4. When a part only of the directors of a manufacturing corporation attend a directors' meeting, and transact business, it is not necessary to the validity of their transactions that it should appear that the absent directors had notice of the meeting: If the contrary do not appear, the legal presumption is that they had notice. *Ib.*
5. The directors of a manufacturing corporation voted that an assignment of all the property of the corporation should be made to S., one of the stockholders, (who was liable for a large amount, as indorser for the corporation,) for the payment of his indorsements, and authorized the treasurer

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to make such an assignment, and sign it as treasurer: The directors, at the same time, voted that a bond should be taken of S., conditioned that the proceeds of the assignment should be applied to the payment of his indorsements, and that the surplus, if any, should be paid over to the treasurer, for the benefit of other creditors: The treasurer made a deed of release and quitclaim to S. of all the property, real and personal, of the corporation, and constituted S. the attorney of the corporation, to sue for and recover all money due, and all property belonging, to the corporation: To this deed the treasurer signed his own name, and affixed his own seal, declaring that he acted as treasurer and agent of the corporation, and was duly authorized: S. gave a bond to the corporation, with a condition conformed to the aforesaid vote of the directors, and also gave to the treasurer a power of attorney, authorizing him, in the name of S., to settle all accounts and demands of the corporation against all persons, and to sell and dispose of all the property of the corporation, and receive payment therefor, as S. might himself do: Afterwards, another creditor of the corporation attached part of the personal property assigned to S., as the property of the corporation, and S. brought an action of replevin against the attaching officer. *Held*, that the personal property of the Silk Company passed to S., by the assignment; that he was entitled to the property attached; and that the question, whether that property, though belonging to S., might lawfully be attached, under the Rev. Sts. *c.* 38, § 30 for the debt of the corporation, was not open to the officer. *Ib.*

MARRIAGE, PROOF OF.

See EVIDENCE, 6.

MECHANICS' LIEN.

1. A wife, by joining with her husband in a written contract with a mechanic for furnishing labor or materials for erecting a building on her land, does not thereby create a lien on her estate in the land for the amount due to the mechanic for such labor or materials, under the Rev. Sts. *c.* 117, and therefore cannot properly be joined with her husband in a petition, by the mechanic, that the land may be sold for a breach of such contract: But such contract creates a lien on the husband's estate in the land, and if she be joined in such petition, the petitioner may discontinue as to her, and proceed against the husband for a sale of his estate in the land. *Kirby* v. *Tead*, 149.

2. By a written contract with a mechanic, made by a husband and wife, for the erection of a building on the wife's land, it was provided that the last payment, of $430, to the mechanic should be made "upon the entire fulfilment of the contract, in all its parts, on or before the first day of May" 1844: There was also a provision in the contract, that if any difficulty should arise between the parties, in the construction or execution thereof, it should be submitted to the decision of two housewrights: The building was not completed on the first day of May 1844, but was completed on or before the tenth day of June following: A difficulty arose between

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the parties, as to the construction and execution of the contract, and they submitted the matter, on the twelfth day of June 1844, to two housewrights, who decided, on the fourteenth day of said June, that the husband and wife should pay to the mechanic a balance less than $430; and on the thirteenth day of December 1844, the mechanic filed a petition that the land on which the building was erected might be sold, and the proceeds of the sale be applied to the discharge of the balance found due to him by the housewrights. *Held*, that the mechanic's lien on the husband's estate in the land was not dissolved at the time of the filing of the petition, by virtue of the provision in Rev. Sts. c. 117, § 3, that "the lien shall be dissolved at the expiration of six months after the time when the money due by the contract, or the last instalment thereof, shall become payable, unless a suit for enforcing the lien shall have been commenced within the said six months." *Ib.*

3. At the time when a husband and wife made a contract with a mechanic to furnish labor and materials for the erection of a building on the wife's land, they had not had a child born alive; but after the mechanic filed a petition that the land might be sold for breach of the contract, pursuant to the Rev. Sts. c. 117, they had a child born alive. *Held*, that the mechanic's lien extended to the husband's estate in the land as tenant by the curtesy initiate. *Ib.*

MILL AND MILL DAM.

1. A., the owner of land and mills on a stream above the land and more ancient mill of B., on the same stream, raised his mill dam higher than it formerly was, and kept back the water as long as was necessary to fill his mill pond, and no longer, whereby B.'s mill was temporarily stopped. *Held*, that this was not an unreasonable use of the stream by A., and that B. had no cause of action against him. *Pitts* v. *Lancaster Mills*, 156.

2. *It seems*, that when a cellar is flowed by water which is set back through the drain therefrom, by the raising of a mill dam, the remedy, if any, of the owner of the cellar, is under the mill act, (Rev. Sts. c. 116,) and not by action at common law. *Cotton* v. *Pocasset Manufacturing Co.* 429.

3. When a drain is made to discharge itself upon private land, without the owner's consent, and he has not acquiesced for twenty years, he is not liable to an action at law, nor to the process prescribed by the mill act, for raising a mill dam on his land, and thereby obstructing the drain and flowing the cellars connected with it. *Ib.*

4. A mortgagee of land and a mill thereon, who enters on the mortgaged premises, and causes the tenant thereof, who is in possession under a parol lease from the mortgagor, to attorn, is an occupant of the mill, within the meaning of the Rev. Sts. c. 116, § 24, which give an action "against the person who shall own or occupy the mill at the time the action is brought," to recover annual or gross damages awarded to the plaintiff for the flowing of his lands by the dam of the mill, although such mortgagee does not enter upon the premises for the purpose of foreclosing the mortgage *Abbott* v. *Upham*, 172.

See DEED, 3–6

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MONEY HAD AND RECEIVED.

See ASSUMPSIT, 1. PROMISSORY NOTE, 6.

MORTGAGE.

Of Personal Property.

A. sold certain personal property to B., as stock for a tannery, and took a note therefor, payable in four months, with interest annually; and B, to secure the note, made to A. a mortgage, which was duly recorded, of the same and other property, and also of whatever stock, of every description, that might thereafter belong to B., wherever situated, and whether manufactured or not, or whether at market or not, or the proceeds of the same, if sold, and all leather that might thereafter be manufactured from the proceeds of property then on hand, and in whatever shape it might thereafter exist, so that the then existing and the future property and earnings of B.'s tan works might stand conveyed, pledged, and hypothecated to A. *Held*, that A. had no legal or equitable lien on any property which was not in existence at the time of the mortgage, but which afterwards came into B.'s hands, unless he had done some act by which he obtained possession of that property; and that, as he had done no such act, and as A.'s property, acquired subsequently to the mortgage, had been assigned under *St.* 1838, *c.* 163, B. could not, under § 3 of that statute, require that such property should be sold, and the proceeds applied towards the payment of A.'s note to him. *Moody* v. *Wright*, 17.

2. A master in chancery, after reciting that attachments had been laid on the estate of an insolvent debtor, by A. and B., and by certain other persons whose names were to him unknown, passed an order that said attachments should survive, according to the provision of *St.* 1841, *c.* 124, § 5; that the assignees should have power to proceed with the suits in which the attachments were made; and that the messenger should give notice to the attorneys in said suits, and to the attaching officers, by serving them with an attested copy of said order: Such service was made on all the attaching officers, and on the attorney of C., an attaching creditor who was not named in the order. *Held*, that C.'s attachment survived, and that the assignees had authority to proceed with C.'s suit against the insolvent debtor. *Denny* v. *Lincoln*, 200.

3. *It seems*, that actual notice to a creditor, of an unrecorded mortgage of the personal property of his debtor, does not debar him from taking such property by attachment or execution: But if any notice will debar him, it must be notice that is full, clear and explicit, so as to designate the specific property bound by the mortgage, by marks and numbers, or other description, capable of identifying it; especially when it is left in the possession of the mortgagor: The notice must express the sum for which the property is bound, and must give substantially the same information as would be given by an inspection of the mortgage deed. *Ib.*

4. When mortgaged goods are attached, and the mortgagee makes demand on the attaching officer to pay the mortgage debt, according to the

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provisions of the Rev. Sts. c. 90, and the officer does not make payment within twenty four hours, the mortgagee becomes entitled to the immediate possession of the goods, and may maintain an action of trover against the officer, although the mortgage was made to secure a note payable on demand, and the mortgagee had never demanded payment of it, and although the mortgagor was entitled, by a provision in the mortgage, to retain possession of the goods until condition broken. *Alden* v. *Lincoln*, 204.

5. A. mortgaged goods, with a provision that he might retain possession thereof until the condition of the mortgage should be broken, and afterwards, before the mortgage was recorded, formed a partnership with B., and put the goods into the partnership stock, and he and B. treated them as partnership property: After the partnership was dissolved, and after the mortgage was recorded, A. conveyed the goods to B. in trust to pay the partnership debts, and they were subsequently attached by creditors of the partnership, before breach of the condition of the mortgage. *Held*, that the mortgagee's property in the goods was not divested, and that he might demand, of the attaching officer, payment of the mortgage debt, and thereby entitle himself to all the rights given to a mortgagee by the Rev. Sts. c. 90. *Ib.*

6. When personal property is mortgaged, without a delivery thereof to the mortgagee, and the mortgage is not recorded, a party who buys the property of the mortgagor, and takes possession of it, though he has knowledge of the mortgage, will hold the property against the mortgagee. *Travis* v. *Bishop*, 304. *Shapleigh* v. *Wentworth*, 362.

7. When a debtor, who has mortgaged personal property to secure a debt, dies insolvent, the mortgagee cannot prove his debt in full, before commissioners appointed to examine the claims against the deceased's estate, unless he first waives his mortgage; but if he applies the amount of the mortgaged property towards the discharge of his claim, and a balance is left unpaid, he may prove such balance before the commissioners. *Furnum* v. *Boutelle*, 159.

8. A. mortgaged to F. certain machinery owned by A. & B. in common, to secure payment of $2500: F. assigned the mortgage to F. & Co., and B. sold his interest in the machinery to F. & Co.: A. used the machinery, until his death, in manufacturing cotton goods, which he sent to F. & Co., to be sold by them on commission, and on which they made advances to him: When A. first sent goods to F. & Co. for sale, they charged said $2500 to him, in the account kept by them with him, and when they forwarded the account, they wrote to him that they should consider the mortgage in force, as collateral security: This charge was never withdrawn from F. & Co.'s account with A., though they rendered accounts current semiannually till his death, and the credits given to him amounted, in the aggregate, to $74,000; the balance of each account, however, being against him: After his death, his estate was represented to be insolvent, and his administrator sold, at auction, "all the right, title and interest A. had in the machinery" aforesaid, to P., one of the firm of F. & Co., who stated, at the auction, that he had a valid mortgage thereon, upon which

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nothing had been paid: F. & Co. afterwards presented their claim fo said $2500, for proof and allowance, to the commissioners appointed to examine claims against A.'s estate, and contended that said mortgage was discharged, by being charged in account as aforesaid. *Held*, that the mortgage was in full force; that P. purchased only an equity of redemption; and that the claim for said $2500 could not be legally proved against A.'s estate. *Ib.*

Of Real Estate.

9. A. and B., in 1827, mortgaged land to C. and D. jointly, to secure one note made by A. and B. to C., and two notes made by them to C., which were signed by D. as their surety: D. paid these two notes, and afterwards, viz. in 1834, C. and D. brought an action on the mortgage, and recovered judgment for possession of the mortgaged lands, unless A. and B. should pay the amount on the other note: Execution issued on said judgment, but was never put into the hands of an officer, and C. never took possession of said lands: In 1840, D. recovered judgment, and took out execution thereon, against A. and B., for the amount of the two notes which he paid for them, as their surety; caused their right to redeem said lands to be sold on said execution; became the purchaser thereof, entered into possession of said lands, and had exclusive possession thereof more than three years: The note which was not signed by D., as surety, was never paid to C., and his administrators brought a bill in equity against D for relief. *Held*, that C. and D. were tenants in common of the legal estate in said lands; that the court had jurisdiction in equity; that an account should be taken of the sum due on the unpaid note; that upon payment of such sum by D. to C.'s administrators, D. would be entitled to hold the mortgaged lands; and that if D. should not pay such sum to them, they would be entitled to a decree for the possession of said lands. *Root* v. *Stow*, 5.

10. A. mortgaged one parcel of real estate to B., and another parcel to C., and A.'s wife released her right to dower in both parcels: A.'s equity of redemption was conveyed to G., who mortgaged it to N.: A. died, and J., his heir at law, took an assignment of the mortgages made to B. and C., and dower therein was set off to A.'s widow, who had released her right of dower, as if no mortgage had been made. *Held*, on a bill in equity brought by N. against J. and the widow, that the assignment of dower was not binding on N., as the widow had no right of dower, as against N., without contributing her portion towards the redemption of the first two mortgages; and that N. had a right to redeem those mortgages, on paying what was due thereon, deducting rent and profits, and to have an assignment thereof made to him. *Niles* v. *Nye*, 135.

11. Under St. 1840, c. 87, § 1, and Rev. Sts. c. 107, § 3, the question, whether a writ of entry is brought for the foreclosure of a mortgage, depends on the case, as disclosed by the proof, and not on the form of the writ. *Blanchard* v. *Kimball*, 300.

12. A writ of entry tc foreclose a mortgage may be maintained, and s

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conditional judgment rendered, against a widow who is in possession of mortgaged lands, assigned to her as dower by a judge of probate, though the judge had no authority to assign dower to her. *Inhabitants of Raynham* v. *Wilmarth*, 414.

See EQUITY, 1. MILL, &c. 4.

NOTICE TO QUIT.

See LANDLORD AND TENANT, 2. 3.

NUISANCE.

See EVIDENCE, 1. WAY, 1.

OUSTER.

See LANDLORD AND TENANT, 1.

PARISH.

1. Before there was any parochial organization in the town of Wareham, and while parochial business was transacted by the inhabitants of the town, in town meetings, the St. of 1825, c. 121, authorized the town to make sale of certain lands "originally appropriated for the support of the regular administration of gospel ordinances therein, and to be exclusively devoted to that purpose;" and directed that at the annual town meetings thereafter held in March or April, three or more persons should be elected trustees of the fund to be raised by such sale, who should invest the proceeds of the sale in some productive fund, and "annually appropriate the income thereof, according to the original intention of said town when the lands aforesaid were laid out and appropriated:" In 1826, said lands were sold, and in 1827 and 1828, the town elected trustees, who invested the proceeds of the sale, as required by said statute: In February 1828, the first parish in Wareham was organized, and several other parishes were afterwards organized in Wareham: In 1828 and ever afterwards, said first parish annually elected trustees of said fund, to whom it was transferred, and who invested it, in the name of the "Trustees of the Ministerial Fund in Wareham," in shares in the capital stock of Wareham Bank, and appropriated the income to the use of said parish: No trustees were elected by the town, after 1828, until 1844: In 1844 and the two following years, trustees were again elected by the town, and in 1846, the town voted to request said trustees to collect the interest on the ministerial fund and divide it among the several religious societies in the town, in proportion to their population; and said trustees brought an action against the Wareham Bank to recover the dividends declared on the aforesaid shares standing in the name of the "Trustees of the Ministerial Fund." *Held*, that the lands were holden by the town in its parochial capacity, and that the proceeds of the sale thereof were holden in the same capacity, until the separate organization of the first parish; that upon such organization of the first parish, the fund, in which those proceeds were invested, became the property of said parish, and were subject to its control; that the St.

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of 1825, c. 121, was not intended to change, and did not change, the legal character of the fund, and vest it in the town in contradistinction to the first parish; that the direction to the town to elect trustees was applicable to the town only while it acted in its parochial capacity; and that the parish, when separately organized, had the sole authority to elect trustees to manage the fund; and that the action could not be maintained. *Tobey* v. *Wareham Bank*, 440.

2. The omission of a parish, for one year, to elect parish officers, does not necessarily operate as a dissolution of the parish; and if it did, the parish property would not therefore vest in the town, although the town held the property, in its parochial capacity, before the parish was separately organized. *Ib.*

3. A parish, as well since as before the repeal of St. 1789, c. 19, by St. 1826, c. 143, is legally capable of taking and holding gifts, devises and bequests of real and personal property, for the purpose of maintaining and supporting schools. *White* v. *South Parish in Braintree*, 506.

4. In 1829, A., B. and C., and their associates, were "incorporated as a religious society and body politic and corporate, with all the powers, privileges and immunities, and subject to all the liabilities of parishes according to the constitution and laws of this Commonwealth;" and said society was authorized "to hold and possess, by grant, gift, devise or otherwise, real and personal estate, for the purpose of supporting public worship, and other parochial charges." *Held*, that the act of incorporation placed the society on the same footing with all other parishes and religious societies not territorial, and that the society had a legal capacity to take and hold real and personal property, given to it by a will, in which the testator directed that the property should "be applied for the benefit of schooling all the children belonging and residing in said parish." *Ib.*

PARTITION.

1. Under the Rev. Sts. c. 103, a joint tenant or tenant in common, though disseized, may maintain the process of petition for partition, if he has a present right of entry, as he might under the previous statutes. *Marshall* v. *Crehore*, 462.

2. Before the passing of St. 1850, c. 278, a respondent, in the process of petition for partition, had no remedy for the improvements which he or those under whom he claimed might have made on the premises of which partition was sought. *Ib.*

PARTNERSHIP.

When one of two partners, with the consent of the other, sells and conveys one half of the effects of the firm to a third person, and the other partner afterwards sells and conveys the other half to the same person, such sales and conveyances are not *prima facie* void, as against the creditors of the firm, but are *prima facie* valid, against all the world, and can be set aside only by the creditors of the firm, upon their proving the transactions to be fraudulent as against them. *Kimball* v. *Thompson*, 283.

See Set-off, 1. Trustee Process. 4.

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PAUPERS.

1. In an action against a town to recover for the support of a pauper whose settlement was once in that town, the burden of proving that he afterwards acquired a settlement in another town, is on the defendants. *Inhabitants of Oakham* v. *Inhabitants of Sutton*, 192.

2. A person does not acquire a settlement in a town, under Rev. Sts. c. 45, § 1, clause 4th, by having an estate of inheritance or freehold in the town, and living on the same three years successively, if he receive support as a pauper, during those three years, from the town in which he had his settlement. *Ib.*

3. Support granted to a person, as a pauper, by the overseers of the poor of the town in which he has a settlement, will prevent his acquiring a settlement in another town in which he resides, although the act of the overseers, in granting such support, be not ratified by the town of whose poor they are overseers. *Ib.*

4. The provision in the Rev. Sts. c. 46, § 15, that "when any person shall be supported in any town, other than that in which he has his settlement, the town that is liable for his support shall not, in any case, be required to pay therefor more than at the rate of one dollar a week, provided the town that is liable for the support of the pauper shall cause him to be removed, within thirty days from the time of receiving legal notice that such support has been furnished," does not apply to the case of the removal of a pauper after his decease, though before burial. *Inhabitant of Webster* v. *Inhabitants of Uxbridge*, 198.

See Evidence, 12. Will, 4.

PLEADING.

Parties.

See Mechanics' Lien, 1. Rail Road Corporation, 2. Trustee Process, 1.

Declaration.

See Easement, 1. Slander, 1. Trespass. Way, 8.

POLICE COURT OF LOWELL.

See Limitations, &c. 2.

PROMISSORY NOTE.

1. A note in this form, viz. "$300. For value received, I promise to pay F. & Co. three hundred," is a good note for three hundred dollars. *Sweetser* v. *French*, 262.

2. J., holding a note against W., who died solvent, and of whose estate his son G. was administrator, demanded payment of the note from G., and threatened to put it in suit, if it were not paid: A sale of W.'s real estate was necessary, in order to pay his debts, and a sale thereof, when this demand was made, would have been at a sacrifice: S., the widow of W., for the sake of preventing such sacrifice, guarantied payment of

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the note, and received from G. a deed of his share of W.'s real estate and J. forbore to sue on the note, but did not give S. notice that G. had not paid it: After a suit against G., as administrator, was barred by the statute of limitations, (Rev. Sts. c. 66, § 3,) J. sued S. on her guaranty. *Held*, that the guaranty was on a sufficient consideration, and that the omission to give S. notice of non-payment by G. furnished no defence to the suit, as she was not prejudiced by such omission. *Johnson* v. *Wilmarth*, 416.

3. After a suit against an administrator, who was also one of the heirs of his intestate, who died solvent, was barred by the statute of limitations, (Rev. Sts. c. 66, § 3,) the administrator, by consent and agreement of the intestate's widow, made a note, payable to her or order, for a debt due from the estate to W., and she indorsed it to W. *Held*, in a suit by W. against the widow, on this note, that it was given on a good and sufficient consideration. *Wheaton* v. *Wilmarth*, 422.

4. D., as principal, and G., as surety, gave a joint note to T. in March 1841, payable in April 1842: In April 1843, T. demised a farm to D. for one year, by a written lease, which contained a provision that the produce and profits of the farm should be holden for the payment (among other debts of D.) of the aforesaid note: T. took no measures to obtain the produce of the farm, but permitted D. to dispose of it, without objection; and G had no knowledge of said provision in the lease, until after D. had disposed of said produce. *Held*, in a suit by T. on the note, that his omission to obtain the produce of the farm and apply it to the payment or part payment of the note, did not discharge G. from his liability to pay the note in full. *Taft* v. *Gifford*, 187.

5. In an action by the payee of a negotiable note against two or more persons, as joint promisors, where one of the defendant's names is on the face of the note, and the names of the others are on its back, without date and in blank, the legal presumption is, that all the names were signed at the same time. *Benthall* v. *Judkins*, 265.

6. M. & D. made a note to F. & Co., not negotiable, and F. & Co., at the same time, wrote their names in blank on the back of the note, and M. & D. transferred it to A. *Held*, that A. had legal authority to write over the names of F. & Co. a promise to pay the contents of the note to him, and that he might recover of them the amount of the note, in an action of indebitatus assumpsit on the money counts. *Sweetser* v. *French*, 262.

7. The following notice, seasonably given, was held sufficient to bind the indorser of a note, which was made payable at a bank: "April 20 1846. Mrs. S. L. Wilmarth. Please to take notice that a note, signed by George L. Wilmarth, for three thousand dollars, indorsed by you, is due this day, and by me protested for non-payment. You are requested to pay the same to the holder. E. F. Notary Public." *Wheaton* v. *Wilmarth*, 422.

8. A. made a note payable to E. at a certain bank, and E. indorsed it in blank to C., who also indorsed it, and put it into the bank; but whether it was discounted by the bank, or was received for collection merely, did not appear: After bank hours, on the last day of grace, the bank gave notice

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to C. that the note was unpaid, and C., on the same day, put into the post office a notice, directed to E. at his place of residence, in these words "The note of A., which you indorsed, fell due this day, and remains unpaid. Please let me hear from you in regard to it." *Held*, that this notice was sufficient to charge E. as indorser. *Clark* v. *Eldridge*, 96.

See INTEREST.

RAIL ROAD CORPORATION.

1. A shop, adjoining a rail road track, was destroyed by fire communicated by a locomotive engine of a rail road corporation; and while the shop was burning, the wind wafted sparks from it, across a street, sixty feet, upon a house, and set it on fire, whereby it was injured. *Held*, that the owner of the house was entitled to recover of the rail road corporation the damages caused by the fire, under St. 1840, c. 85, § 1, which provides that when any injury is done to a building of any person "by fire communicated" by a locomotive engine of a rail road corporation, the said corporation shall be responsible, in damages, to the person so injured. *Hart* v. *Western Rail Road*, 99.

2. A.'s house, which was insured, was injured by a fire communicated by a locomotive engine of a rail road corporation, and the underwriters paid to A. the amount of his loss, for which the rail road corporation was also by law responsible to him. *Held*, that such payment did not bar A.'s right to recover also of the rail road corporation, and that A., by receiving payment of the underwriters, became trustee for them, and, by necessary implication, made an equitable assignment to them of his right to recover of the rail road corporation; and that the underwriters, on indemnifying A., might bring an action, in his name, for their own benefit, against the rail road corporation, and that A. could not legally release such action. *Ib.*

3. Under the Rev. Sts. c. 39, § 57, which provide that a party, who is dissatisfied with the estimate, made by county commissioners, of the damages caused by taking land for a rail road, "may apply for a jury to assess the damages, either at the same meeting at which such estimate shall be completed and returned, or at the next regular meeting thereafter," if a party applies for a jury, at the same meeting at which the estimate is completed and recorded, and a jury is then ordered, and a warrant therefor issued, he cannot, by merely omitting or refusing to proceed under that order and warrant, entitle himself to a jury on applying therefor at the next regular meeting of the commissioners. *Taylor* v. *County Commissioners*, 449.

4. Though an original petition for a jury to assess damages caused by the taking of land for a rail road is not seasonably filed, if it be after the regular meeting of the county commissioners next following that at which they completed and returned their estimate of such damages, yet if such petition be filed at the same meeting at which they complete and return such estimate, and they thereupon, without notice to the rail road corporation pass an order and issue a warrant for the summoning of a jury, and the warrant is not served, they are authorized, and ought, upon motion of the land owner, though the motion be not made until after their next regular

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meeting, to issue an order of notice to the rail road corporation to show cause why a jury should not be summoned on the original petition; the first order for a jury being void, for want of such notice, and the original petition being still pending. *Porter* v. *County Commissioners*, 479.

5. The provision in Rev. Sts. c. 24, § 19, that jurors for the assessment of damages caused by the laying out of a highway shall be taken from "the three nearest towns not interested," means the three towns nearest to the town in which the land lies, over which the highway is laid out: And by Rev. Sts. c. 39, § 57, this provision is extended to jurors for the assessment of damages caused by the laying out of a rail road. *Wyman* v. *Lexington & W. Cambridge Rail Road*, 316.

6. Under Rev. Sts. c. 24, § 15, and c. 39, § 57, which direct that when two or more persons apply, at the same time, to the county commissioners, for a jury to assess damages caused by the laying out of a highway or rail road, "the said commissioners shall cause all such applications to be considered and determined by the same jury," the most proper course for the commissioners is, to issue a single warrant to an officer, reciting all the cases that are to be heard by the jury: If separate warrants for each case be issued by the commissioners, yet if the officer summon a single jury, who hear and determine each case, their verdicts will not be set aside merely because several warrants were irregularly issued. *Ib.*

7. When several applications are made, at the same time, by owners of lands in different towns, for a jury to assess damages caused by the laying out of a highway or rail road, the jurors are to be taken from three towns nearest to the town in which the land of either of the applicants is situate: And when a single application, for such purpose, is made by one who owns lands in different towns, the jurors are to be taken from three towns nearest to either of the towns in which his lands are situate: This is all that is practicable under Rev. Sts. c. 24, § 15, and c. 39, § 57. *Ib.*

8. It is not necessary that notice to jurors, who are drawn to assess damages caused by the laying out of a highway or rail road, should be served by a constable: Such notice may be served by the officer to whom the warrant for summoning a jury is directed. *Ib.*

9. On the hearing, before a jury summoned to assess damages caused to A by the laying out of a rail road over his land, he may give evidence of the price paid by the rail road company for the adjoining land of B. purchased by them: But an owner of adjoining land cannot legally be permitted to state to the jury what, in his judgment, is the value of that land, though he be a farmer who has occasionally bought and sold land; and if he be permitted to make such statement, the verdict of the jury will be set aside, although they were instructed, that opinions, except of experts, were not evidence, and that the facts and reasons on which any opinion or judgment was formed, were the evidence on which they must form their opinion. *Ib.*

10. An act incorporating a rail road company provided that the capital stock should not exceed two thousand shares; that no assessments should be laid on the shares to a greater amount, in the whole, than one hundred

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dollars; that the number of shares should be determined, from time to time, by the directors; and that as soon as two hundred and fifty shares should be subscribed, the company should proceed to construct and open the road. C. subscribed for five shares, and the directors, after more than two hundred and fifty shares were subscribed, voted to close the subscription books of the capital stock, and passed no other vote fixing the number of shares: C. paid six assessments on his shares, but neglected to pay the seventh, and the treasurer of the company, pursuant to the Rev Sts. c. 39, § 53, sold said shares at auction, for a sum insufficient to pay said assessment, and the company thereupon brought an action against C. to recover the deficiency. *Held*, that the vote of the directors to close the subscription books for shares, on a given day, was in effect a vote fixing the number of shares at the number then subscribed for, as ascertained by said books, and lawfully fixed the number for the time being; that C.'s shares were legally liable to assessment; and that he was answerable for the deficiency sued for. *Lexington & W. Cambridge Rail Road* v. *Chandler*, 311.

11. When a defendant is sued as a stockholder in a rail road corporation for the sum remaining due on an assessment upon his shares, after they are sold for non-payment of the assessment, it is competent and sufficient, for the purpose of showing him to be such stockholder, and liable for the assessment, to give evidence that he signed a subscription paper for shares, before the corporation was organized, that he attended the meeting of the stockholders for the organization of the corporation, and that he wrote and distributed votes, and himself voted, for directors. *Ib.*

12. A by-law of a rail road corporation provided, that in case of a sale of shares for non-payment of assessments, the treasurer should give notice to the delinquent owner, when his residence was known, of the time and place of sale, by letter seasonably put into the mail. *Held*, that this by-law was directory to the treasurer, and not a condition precedent; and that a written notice of the time and place of sale, signed by the treasurer, and delivered to the owner of the shares, or left at his dwelling-house, and received by him as soon as he was entitled to receive it by mail, was sufficient. *Ib.*

RECOGNIZANCE.

C. and M. entered into a recognizance before a justice of the peace, the condition of which was, that M. should enter, in the next court of common pleas, the action of A. and B., brought before said justice, to eject M. from certain premises described in the complaint in said action, and transferred by said justice, at M.'s request, to said court — the title to said premises being brought in question by M. — and should pay all rents then due to said A. and B. for the use and occupation, by M., of said premises, and all intervening rent, damages and costs, and should do and receive that which said court should enjoin upon him: M. entered said action according to said condition, and prosecuted it to final judgment against him; and an execution, issued against him for the costs of the suit, was

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returned unsatisfied: The justice did not return the recognizance to the next court of common pleas, with the other papers in the case, and it was not filed in the clerk's office till after said final judgment: After it was filed in the clerk's office, A. and B. brought an action of debt on it against C., in the court of common pleas. *Held*, that the recognizance was a record of that court, within the meaning of the law, though not extended on the book of records; that it sufficiently showed, on its face, the cause of its caption, and the jurisdiction of the justice; and that A. and B. were entitled to recover of C. the rent due to them from M. at the date of the recognizance, and all intervening rent, and the costs of the aforesaid action. *Benedict* v. *Cutting*, 181.

RELEASE.

See ATTORNEY, 2. DEED, 8. RAIL ROAD CORPORATION, 2.

RENT.

See ASSUMPSIT, 2. LANDLORD AND TENANT, 1. 3.

REPLEVIN.

See CONSTABLE.

RESERVATION.

See DEED, 5. 9.

RETURN.

See TAXES, 4. 5.

REVIEW.

1. If objections to the mere form of an original writ can be taken by a defendant, on a writ of review sued out by him after he has been defaulted by mistake at the return term of the original writ, they must be taken at the return term of the writ of review, or they are waived. *Brewer* v. *Sibley*, 175.
2. Whether objections to the mere form of an original writ can be taken on a writ of review, *quære*. *Ib.*

ROAD.

See WAY.

SALE BY EXECUTORS AND ADMINISTRATORS

See EXECUTORS, &c. 1-4.

SCHOOLS.

See PARISH, 3. 4.

SENTENCE.

When a defendant is convicted, at the same term of the court, upon two indictments on the Rev. Sts. *c.* 127, § 16, charging him with uttering and

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passing counterfeit coin as true, knowing it to be counterfeit, and also upon a third indictment on § 15 of the same chapter, charging him with having in his possession, at the same time, ten pieces of counterfeit coin, knowing them to be counterfeit, with intent to utter and pass them as true, the court is not authorized to adjudge him to be a common utterer of counterfeit coin, and pass a single sentence upon him as such, under § 17 of that chapter. *Murray* v. *Commonwealth*, 514.

SET-OFF.

1. In a suit by a surviving partner, to recover a debt due to the firm, the defendant may set off a debt due to him from the surviving partner alone. *Holbrook* v. *Lackey*, 132.
2. Under the Rev. Sts. c. 97, §§ 74–76, when an execution is delivered to an officer to be served, and the person who is the debtor therein delivers to the officer an execution against the person who is creditor therein, the officer cannot justify a refusal to set off the one against the other, by making a return that he had due notice of an assignment of the first execution, at the time when it was put into his hands, and therefore could not set off the one against the other: To justify the officer in refusing to make the set-off, it should appear, by the return, or otherwise, that the execution first delivered to him had been lawfully and in good faith assigned to another person, before the creditor in the second execution became entitled to the sum due thereon. *Porter* v. *Leach*, 482.

SLANDER.

1. A declaration, in an action for slander, alleged that the defendant falsely and maliciously said of the plaintiff, "she is a bad girl, a very bad girl, and unworthy to be employed by any company in Lowell; meaning thereby, that the plaintiff was a prostitute, and had been guilty of fornication, lewdness, lasciviousness and wantonness." *Held*, that the declaration was insufficient, for want of averments and a colloquium that would warrant the innuendo. *Snell* v. *Snow*, 278.
2. On the trial of an action for slander, a witness, who testifies to the words spoken by the defendant, cannot be permitted to state what meaning he understood the defendant to convey by the words. *Ib.*

SPECIFICATION OF DEFENCE.

See Evidence, 13. 14. Witness, 5.

SPECIFIC PERFORMANCE.

See Arbitrament, &c. 1. Equity, 2.

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STREETS.

See WAY, 9.

TAXES.

1. A warrant to collect taxes, issued by assessors to a collector, does not authorize him to collect a tax by distress, unless it is accompanied with a tax list; but it is not necessary that the tax list should be annexed to the warrant. *Barnard* v. *Graves*, 85.

2. Though a warrant to a collector erroneously direct him, for want of goods or chattels, whereon to make distress, for the space of twelve days after

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demanding payment, (instead of fourteen days, as directed by the Rev Sts. c. 8, § 11,) to take the body, &c., yet if the warrant be in other respects sufficient, this error therein will not vitiate it, so as to render illegal a distress made by virtue of it, if, in making the distress, the warrant be executed according to law. *Ib.*

3. Under the Rev. Sts. c. 8, § 8, a collector of taxes, who distrains goods, may post a notification of the sale thereof before the expiration of four days after the seizure. *Ib.*

4. The return made by a collector, on his warrant, of his doings in making a distress for taxes, is so far an official act, as to be *prima facie* evidence in his favor, on the trial of an action against him for making the distress: And a demand by him of payment of a tax, before he made distress for it, may be shown by his return. *Ib.*

5. In a collector's return of his doings on a distress for a tax, he stated that he distrained a horse on the 6th of April, and on the 7th of April posted up a notification, at the B. B. House in D., of said distress, and of his intention to sell said horse at public auction at said house on the 11th of April; that he kept the horse four days and more, and posted up said notification more than forty eight hours before the sale, and sold the horse, within seven days after the seizure, at public auction, at said B. B. House, pursuant to said notification: On the trial of an action brought against the collector for taking and selling the horse, the original notification was produced, which was dated April 8th, and stated that the sale would be on the 11th of April, at the house of T. S. S. in D. *Held*, that the variance between the return and the notification was immaterial; that the return must be taken to be true, until it should be impeached; and that, if impeached merely by showing facts which would equally well justify the collector, he might rely on such facts to sustain his justification. *Ib.*

6. A collector's notification of the sale of a horse, distrained for non-payment of a tax by the owner, need not mention the owner's name, nor describe the horse, nor state the amount of the tax. *Ib.*

7. When a collector of taxes is also a constable, his notification of a sale by him of personal property, distrained for non-payment of a tax, is not vitiated by his adding to his signature the word "constable," instead of collector. *Ib.*

TENANT IN COMMON.

A tenant in common of land, who makes an agreement with the wife of his cotenant, that the cotenant shall have the sole occupation of the land, and pay him a certain sum therefor, cannot maintain an action for such occupation, if he does not prove that the cotenant had actual knowledge of such agreement, or that he authorized his wife to make it. *Wilbur* v *Wilbur*, 404.

See MORTGAGE, 9. PARTITION, 1. TROVER, 2.

TRESPASS.

1. In an action of trespass for taking and carrying away goods, the omission

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to state the value of the goods, in the declaration, is matter of form only, and is cured by pleading in chief as well as by verdict, and is not a ground of exception to the admission of evidence to prove the value. *Baker* v *Baker*, 125.

2. A declaration, in an action of trespass *quare clausum fregit*, described the close as bounded northerly by land of S. and others, easterly by the old N. B. Turnpike, southerly by the road leading to W., and westerly on W River. *Held*, that this description sufficiently complied with St. 1839, c. 151, § 3, which requires that "the close or place of the alleged trespass shall be designated by name or abuttals, or other proper description." *Forbush* v. *Lombard*, 109.

3. In an action of trespass, the declaration alleged that the defendant "broke and entered the plaintiff's dwelling-house in L., being the same dwelling-house occupied by the plaintiff, with force and arms, and did then and there imprison the plaintiff, for the space of one hour, without any legal or probable cause." *Held*, that this was an action of trespass on real estate — an action of trespass *quare clausum fregit* — and that the place of the alleged trespass was sufficiently designated by name, according to the requisition of St. 1839, c. 151, § 3. *Sawyer* v. *Ryan*, 144.

See Costs 2. Deed, 6.

TROVER.

1. When the plaintiff, in an action of trover, admits that the defendant, at the time of the conversion, had a lien on the goods for an ascertained amount, the rule of damages is the value of the goods, deducting the amount of the lien, and adding interest on the balance. *Fowler* v. *Gilman*, 267.

2. A. furnished B. with upper leather to be made into boots, under a parol agreement between them, that the leather should remain A.'s until paid for: B. made boots, and for a while sent them to New York, to be sold by a commission merchant, who made acceptances for B. alone, and made remittances to B. alone: A parcel of boots, afterwards made by B. from upper leather so furnished by A., were attached as B.'s property, and were subsequently sold as such, on execution, by the attaching officer. *Held*, that A. was either the owner of the whole property in the boots, or was owner in common with B., and might, on either ground, maintain an action of trover against the officer for a conversion by the sale on execution. *Bryant* v. *Clifford*, 138.

TRUSTEE PROCESS.

1. A single plaintiff cannot summon himself, nor can several plaintiffs summon one of their own number, as a trustee, in the process of foreign attachment: But the mere fact, that the name and addition of a plaintiff and of a trustee are the same in the writ, does not show that they are one and the same person; and therefore the court cannot legally dismiss the action, upon motion: The identity of the plaintiff and trustee should be pleaded in abatement, in order that it may be traversed, and tried as a question of fact. *Belknap* v. *Gibbens*, 471.

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2. Since the St. of 1837, c. 210, went into effect, a plaintiff, who sues out the process of foreign attachment, and attaches the property of the principal defendant, may proceed with the suit against him, although all the trustees are discharged, if the service on such defendant was made by reading the writ to him, or by delivering to him a copy thereof, attested by the officer who served it, or by leaving such copy for him at his dwelling-house or last and usual place of abode. *Ib.*

3. When a single trustee is summoned in the process of foreign attachment, and is described, in the writ, as of a town in the county in which the action is brought, and he comes in and alleges, in his answer, that he was not an inhabitant of that county, when the suit was commenced, but of another county, and that he had not, when the writ was served, any goods, &c. of the principal defendant in his hands, the court cannot, upon the motion of the principal defendant, dismiss the action upon the ground that it was brought in the wrong county. *Nash* v. *Brophy*, 476.

4. When the principal defendant, in a process of foreign attachment, is a creditor of a firm, and not of the individual members of it, and one only of the firm is summoned, or named in the process, as trustee of such defendant, and he states in his answer that the debt due to such defendant has been paid to him unconditionally, since the service of the process, he cannot be held as trustee. *Ib.*

5. An order of a city council, upon laying out a street, that a certain sum be paid, as damages, to a party over whose land the street was laid out, does not constitute a debt due from the city, and therefore does not make the city liable as trustees of such party, under the Rev. Sts. c. 109, which regulate the trustee process. *Fellows* v. *Duncan*, 332.

USAGE.

In an action for shoes sold and delivered, brought by a manufacturer in this State against a distant purchaser, evidence is admissible to show that when shoes are ordered, it is the usage and course of the shoe business, when no special mode of conveyance is mentioned by the purchaser, for the manufacturer to take the shoes to Boston, at his own risk and cost, and there deliver them to some regular line of packets running to the purchaser's place of business, and take duplicate bills of lading, and forward one of them to the purchaser, by mail, and that from that time, the delivery is complete, and the purchaser takes the risk of loss. *Putnam* v. *Tillotson*, 517.

USE AND OCCUPATION.

See Tenant in Common.

VARIANCE.

See Evidence, 1. Taxes, 5.

VERDICT.

1. When a jury are rightly instructed by the court, that their verdict should

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be for the plaintiff, if they find two specific facts, and the jury return a verdict for the plaintiff, stating therein that they return such verdict on the ground that they find one of those facts, the court cannot order the verdict to be amended and entered as a general verdict for the plaintiff. *Shapleigh* v. *Wentworth*, 358.

2. If, on the trial of a writ of entry against A. and B., there is any evidence against B., however slight, the court will not direct the jury, before finding as to A., to return a verdict for B., for the purpose of his being a witness for A. *Warner* v *Bull*, 1

See AMENDMENT, 4.

WAIVER.

See EVIDENCE, 10. 13. LANDLORD, &c. 3. REVIEW, 1. WRIT, 1. 2.

WAY.

1. The common law, as to nuisances in a highway, is not repealed nor altered by the Rev. Sts. c. 24, § 61. *Commonwealth* v. *King*, 115.
2. An indictment, which alleges that the defendant placed and continued a large quantity of stones on a part of a highway, and thereby narrowed and obstructed it, is not within § 61 of c. 24 of the Rev. Sts., which provides for the removal of a fence erected on a highway, and cannot be maintained on that section, although the proof be that the stones mentioned in the indictment were a wall, made by the defendant, within the limits of the highway. *Ib.*
3. It is an indictable offence at common law to place and continue, within the established limits of a highway, a wall, or stones, or any thing which obstructs the full enjoyment, by the public, of an easement coëxtensive with those limits, although such wall, stones, or other thing, be not placed and continued within that part of the highway which can be safely used for travel. *Ib.*
4. The proper laying out of a town way, in distinction from a public highway, may be presumed, by a jury, from long user and occasional repairs, with other circumstances tending to show that the way was originally laid out as such way. *Commonwealth* v. *Belding*, 10.
5. On the trial of an indictment for a nuisance in a road, caused by digging a ditch across it, the defendant introduced evidence that, at a remote period, a similar ditch, useful for draining certain meadow lands, was in the same place, and had been afterwards filled up; and he contended, that the nuisance, with which he was charged, was the mere removal of a preëxisting nuisance. *Held*, that if the road had been used more than forty years, without the incumbrance of the ditch, the right to reopen it had been lost. *Ib.*
6. When a party, who is indicted for obstructing a road, gives evidence that when he obstructed it, he opened a new and convenient way on his own land, which was used for seven or eight years, and until a bridge, which he built in the new way, was carried off by a flood, such evidence does not show an abandonment of the old road, nor furnish any defence to the indictment. *Ib.*

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7. In a highway, running east and west, the wrought path was changed from the south to the north side of the space between the limits of the highway, leaving a steep descent between the new and the old wrought path; and the old path ceased to be a part of the wrought or travelled pathway: At a right angle with said highway, and running therefrom southerly, was a road leading to the house of A., which road, on a certain day, was wholly obstructed by snow; and there was, on the same day, a private pathway made by A., across his fields, from his house to that part of said highway where the wrought and travelled path had been changed, as aforesaid: While the road leading from said highway to A.'s house was thus obstructed, he, knowing all the facts, was travelling, in a sleigh, along the newly wrought and travelled path in said highway, and turned his horse southerly, for the purpose of entering upon said private pathway, and in passing down the descent between the new and the old wrought and travelled path, his sleigh was upset, and he received an injury: He thereupon brought an action against the town that was bound to repair said highway, to recover damages for the injury which he received by reason of a defect therein. *Held*, that the action could not be maintained. *Shepardson* v. *Inhabitants of Colerain*, 55.

8. An action cannot be maintained against a town for damages alleged to have been caused to the plaintiff by the obstruction of a road by snow, by reason whereof he was prevented from travelling on the road, with his cattle and teams, and on foot, and from transporting his logs and timber to a saw mill, and from otherwise working in his wood lot, and about his logs and wood: And a declaration, setting forth such cause of action, is bad on demurrer. *Holman* v. *Inhabitants of Townsend*, 297.

9. A city is liable, under Rev. Sts. c. 25, § 22, to pay damages to a person who receives an injury by the fall of an awning projected over the sidewalk of a street by the owner of a building, if the awning be dangerous to travellers for the space of twenty four hours before the injury happens *Drake* v. *City of Lowell*, 292.

WILL.

1. Oliver Smith bequeathed to his executor, in trust, a large sum, to be secured at interest, and managed as an accumulating fund, until a board of trustees should be duly constituted and organized, and then that said sum should be paid over to such trustees, to be managed in the same manner; and he directed that said board of trustees should be constituted as follows; viz. that each of eight certain towns should annually, in March or April, at a legal town meeting, choose an elector, and that the several electors, thus chosen, should annually meet at N. on the first Wednesday of May, and elect three trustees, who should be a board of trustees for one year; provided, however, that the first choice of said electors, by the towns, and also their first meeting at N., might be made and holden at such convenient time, within one year after the testator's decease, as the judge of probate should appoint, and that said trustees, thus elected at said first meeting, should hold their office till the first Wednesday of May

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next following, and until others should be chosen in their place. The testator died in December 1845, and his will was not finally approved and allowed until July 1847: On the 10th of August 1847, the judge of probate appointed the 30th of said August as the time for the eight towns to choose electors, and the 6th of September following as the time for the meeting of the electors at N., and electors were chosen and met at N. accordingly, and elected three persons to be trustees, who organized as a board of trustees, and demanded of the executor that he should pay over to them the sum aforesaid, according to the will; and on his refusal so to do, they brought a bill in equity against him. *Held*, that they were not legally constituted a board of trustees, because the judge of probate had no authority to direct town meetings, or a meeting of the trustees, to be held after the expiration of one year from the decease of the testator. *Baker* v. *Smith*, 34.

2. A testator made the following devise in 1775: "I give to my brother W.'s son N., during his natural life, (after the decease of my wife,) and to his eldest male heir, and after his decease and to said male heirs and assigns forever, all and singular, my homestead," &c.: At the time of making the devise, N. had no issue; but he afterwards had several children, of whom the third son alone survived him. *Held*, that N. took a life estate only, and that, at his decease, his surviving son took an estate in tail male. *Canedy* v. *Haskins*, 389.

3. A testator made the following devise: I give unto my wife M. and to my youngest son N., her only child, all that part of my real estate (described;) provided always, that if M. shall survive N., and N. die without issue, then I give said lands to M. for her life, and after her decease to my children, S., A., M. and C., and their heirs forever, in equal portions; provided always, that if my son N. shall survive my wife M., I give said lands to said N. and to the heirs of his body, and if he or they die without issue, then I give said lands to my children, S., A., M. and C., and to their heirs forever, in equal portions; provided always, that if my wife M. shall die before me, then I give said lands to my said son N. and to the heirs of his body; provided always, that if my son N. shall die before me, without issue of his body, then I give said lands to my wife M. for her sole use during her life, and after her decease I give the same to my children, S., A., M. and C., and to their heirs forever, in equal portions; provided always, that if my son N. die before me, leaving heirs of his body, then I give said lands to his said heirs, in the same manner, and on the like terms and conditions, as I have now given the same to my son N., either jointly with his mother, or to his own use, as events may prove; my meaning and intention being to give said lands to my said wife and my said son N., for their lives, and to the survivor of them, then to the children of said N., and in default of issue, then to my children, S., A., M. and C., and to their right heirs forever. If my said son N. should, at any time after my death and the death of his mother, be desirous of disposing of his interest in the lands devised to him in manner as aforesaid, my will is, that he should first offer the same to my eldest son, and if he refuse to purchase

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the same, then to my next son, and so on in succession; and if they all refuse to purchase the same, then he is at liberty to sell his interest in the same to whomsoever he may see fit.

The testator's wife M. and his son N. survived him, and N. survived M.: When the testator's will was made, N. was unmarried; but at the time of the testator's death, N. was married and had children, who were living at the time when he made the deed hereinafter mentioned: After M.'s death, N. offered the lands, devised as above stated, to the testator's elder sons, in succession, according to the testator's will, and they all declined to purchase the same: N. afterwards conveyed said lands to W., in fee simple, by a deed of warrantry, in common form, with the usual covenants; and W. brought an action of covenant broken against N. *Held*, that the will gave N. an estate tail, and that he had authority, by the Rev. Sts. c. 59, § 3, to bar the entail by his deed to W., and that W. could not maintain the action. *Weld* v. *Williams*, 486.

4. S. bequeathed a fund to the town of F., the annual interest of which he directed to be applied for the support of his children, grandchildren or great grandchildren, if any of them should need support; otherwise, for the support of the poor of F.: N., a great grandchild of S., having a legal settlement in the town of M., was supported, as a pauper, by the town of W., and M. reimbursed W., and brought a bill in equity against the town of F. to obtain the sum thus expended for the support of N. *Held*, that the bill could not be maintained. *Inhabitants of Marlborough* v. *Inhabitants of Framingham*, 328.

5. A testator, by one clause in his will, gave to his wife the use of all his property, real and personal, except one hundred dollars, as long as she should remain his widow; and in the next clause, he declared his will to be, that all his property, which should remain, after the death of his wife, or after she should cease to be his widow, should be divided equally among his children. *Held*, that the wife was entitled only to the interest of the money remaining in the executor's hands, after settlement of his administration account, and that he was to hold the principal during the wife's life or widowhood, as trustee for the children. *White* v. *Sawyer*, 546.

WITNESS.

1. In an action against the indorser of a note, the maker, if released by the indorser, is a competent witness for him. *Wheaton* v. *Wilmarth*, 422.

2. In an action brought by the assignees of an insolvent debtor to try the validity of a sale of chattels made by him shortly before proceedings in insolvency were instituted against him, he is a competent witness for the purchaser, to prove that the sale was not made for such purpose, or with such intent and knowledge, as rendered it void against his creditors. *Clark* v. *Gordon*, 434.

3. On the trial of an action of trover against H. & E., the jury disagreed as to H., but found a verdict in favor of E., on which judgment was rendered. *Held*, on a second trial of H., that E. was a competent witness for him. *Lackey* v. *Holbrook*, 131.

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4. In a suit by heirs, to recover land of which their ancestor died seized, upon the alleged ground that the sale thereof by his administrator, under a license, was fraudulent and voidable, the surety of the administrator, on his administration bond and also on the bond given by him on his obtaining license to sell, is a competent witness. *Blood* v. *Hayman*, 231.

5. When the right of all the inhabitants of a town to fish in a certain pond and creek is tried on the general issue, in a suit between two of them, the other inhabitants are competent witnesses to prove such right, although the defendant files a specification of defence, in which he sets forth such right. *Aliter*, before St. 1836, *c.* 273, when such right was put in issue on a special plea in bar. *Look* v. *Bradley*, 369.

See VERDICT, 2.

WORK AND LABOR.

See ASSUMPSIT 4.

WRIT.

1. An objection to a writ, that it has not a proper seal, is waived, if not taken at the first term of the defendant's appearance. So of an objection to a writ, that the defendant is summoned "to answer to A. B. or his authorized attorney, C. D." *Brewer* v. *Sibley*, 175.

2. Though a writ, in which the damages are laid at more than seventy dollars, is served by a constable, who has no authority to serve it, yet if the defendant enters his appearance generally, and does not except to the service, at the return term, he waives the irregularity, and cannot subsequently take advantage of it. *Smith* v. *Robinson*, 165.

See REVIEW.

WRIT OF ENTRY.

See MORTGAGE, 11. 12.

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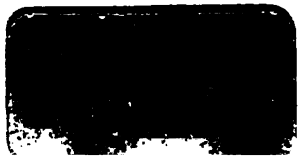

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